UQP

ISAAC ISAACS

ZELMAN COWEN

ISAAC ISAACS

Zelman Cowen, born 7 October 1919 in Melbourne, was educated at Scotch College and the University of Melbourne where he took degrees in arts and law. In 1940 he was elected as Rhodes Scholar for Victoria, which he took up in 1945 after war service in the Royal Australian Navy.

At Oxford he undertook postgraduate legal study and was Vinerian Scholar in 1947. From 1947 to 1950 he was a Fellow of Oriel College. In 1951 he returned to Australia as Professor and Dean of the Faculty of Law at the University of Melbourne. In 1967 he became Vice-Chancellor of the University of New England then in 1970 was appointed Vice-Chancellor of the University of Queensland.

In December 1977 he was sworn in as the nineteenth Governor-General of Australia and served till July 1982. He then accepted appointment as Provost of Oriel College, Oxford, and held that office until his retirement in July 1990. He also served as Pro-Vice-Chancellor of the Oxford University.

From 1983 to 1988 he was Chairman of the British Press Council. He was also foundation Chairman of the Menzies Centre for Australian Studies in London from 1982 to 1990. He is Chairman of the Van Leer Jerusalem Institute and in 1992 he was appointed Chairman of John Fairfax Holdings, Ltd.

Sir Zelman has written extensively on legal, political and social themes. His Boyer Lectures for 1969 were published as the *Private Man*. An edited version of his speeches as Governor-General was published in 1986 under the title *A Touch of Healing*. He was first knighted in 1976 and is the recipient of honorary degrees, fellowships and awards from Australia, the United Kingdom, the United States, Israel and Italy.

ISAAC ISAACS

ZELMAN COWEN

University of Queensland Press

First published 1967 by Oxford University Press
Published in paperback 1993 by University of Queensland Press
Box 42, St Lucia, Queensland 4067 Australia

Printed in Australia by McPherson's Printing Group, Victoria

Distributed in the USA and Canada by
International Specialized Book Services, Inc.,
5804 N.E. Hassalo Street, Portland, Oregon 97213-3640

Cataloguing in Publication Data
National Library of Australia

Cowen, Sir Zelman, 1919-
Isaac Isaacs.

New ed.
Bibliography.
Includes index.

1. Isaacs, Sir Isaac, 1855-1948. 2. Judges — Australia — Biography.
3. Governors general — Australia — Biography. 4. Australia — History.
I. Title.

994.04092

ISBN 0 7022 2453 7

INTRODUCTION TO THE NEW EDITION

In this last decade of the century we commemorate the centenaries of events which are significant in the history of Australia; it was in the course of the 1890s that major historic events leading to federation and to the establishment of the Commonwealth of Australia took place. One hundred years ago, in 1892, Isaac Isaacs was first elected to the Legislative Assembly of Victoria as member for Bogong, and from that time, and throughout the decade and beyond, he played an active role in colonial Victorian and Australian politics. After an uncertain start, he became Attorney-General of Victoria, and in 1897 he was elected to the federal convention which met successively in Adelaide, Sydney and Melbourne, and drafted the constitution for the Commonwealth of Australia which, with some modifications, was enacted by the United Kingdom parliament in 1900 and came into operation on 1 January, 1901. Isaacs was not elected to the important drafting committee of that Convention, but he participated actively and significantly in its debates and decisions.

I am pleased that the University of Queensland Press has decided to reprint my life of Isaac Isaacs, which first appeared in 1967, twenty-five years ago. I had been moved to write about Isaacs for a complex of reasons. In my years as a law student, I had read the judgments he delivered as justice of the High Court in many areas of the law, and they were familiar to me as a teacher and lawyer. He was a great Australian lawyer. He was the first Australian born and resident Governor-General of Australia. As a young man, I saw him from time to time in Melbourne places, and on one occasion I talked briefly with him, if talk be the appropriate word to describe what took place in an encounter between an awestruck boy and an eminence whom the boy viewed as a colossus. As an Australian Jew, I had a special interest in the life and work of a fellow Jew who, with no assistance beyond his own abilities, made for himself a brilliant career in the law and public life of this country. Despite this great achievement, it seemed to me

that so very soon after his death, he had been largely forgotten; there are few memorials to a man whose achievements testify to the possibilities of the *carriere ouverte aux talents* in this country.

II

I did not then know that the Governor-Generalship was to link me with Isaacs. As I have said, he was the first Australian born holder of the office. I was the sixth. Ten years after the book was published in 1967, I was invited by the Prime Minister, Mr Malcolm Fraser, to come to see him in Canberra, and he then proposed that my name should go forward to the Queen for appointment as successor to Sir John Kerr as Governor-General. Among the thoughts which crowded into my mind was the one that it was an extraordinary thing that I should have been a biographer of Isaacs. As the *first* Australian born and resident Governor-General, his appointment had been a matter of sharp and vehement controversy over the propriety of appointing a "local" man. By 1977, that issue was as dead as the dodo, but angry dispute surrounded the office in the aftermath of the exercise of the constitutional power of dismissal by my predecessor, Sir John Kerr.

Isaacs was the first Governor-General to live throughout his term in Canberra, and to make his home at Yarralumla. As I worked in the place in which he had worked, I thought about things which, of course, had not occurred to me when I wrote about him in this book. Some of these were of special interest to the holder of the office. How did Isaacs work? How did he manage his household and his office in those depression days of the 1930s in the early years of a small Canberra in a smaller, much more isolated Australia? What sort of programme did he follow, and how was it planned? The book told of a wide range of activities, often recorded in family letters, which were undertaken by this very active man who turned eighty in the course of his term. In many respects, there was a readily recognisable pattern of work. To be sure, by my time the jet aircraft had replaced the train, and that made possible a range of activities and the acceptance of invitations which Isaacs could not have undertaken at all, or certainly not so easily in his time. I believe that he would have undertaken them and enjoyed them, had the means been available to him, and in this respect I do not think that we would have been very different in our responses to these tasks of the office.

When I was appointed, a number of people wrote and spoke to me about Isaacs, and ever since the book was published I have added in such ways to my store of knowledge about him. I recall, specially, the

receipt of a letter from a man who, as a boy, had written to Isaacs as Governor-General. Isaacs responded with a handwritten letter, a copy of which my correspondent sent to me.

> Believe me, my dear young Australian brother, I value such letters as yours. But it is not always possible for me to reply personally. I wish I could. I am not, however, going to allow you to be disappointed. You have a very special claim upon me.

I have known such letters, and I identify myself very closely with Isaacs' response. And on occasion, when I spoke at citizenship ceremonies, I would recount the story of Isaacs, the son of poor immigrants who had arrived in Australia only a year before his birth. I could reflect that my own story, while different in some respects, was not so very different, and I said that I believed that this should carry a message to those who were participants in such ceremonies, and who could see the evidences of great human opportunity in such life stories. We have reason to be very proud of a country which makes this possible and actual.

In the book, I tell, on the authority of Sir Robert Garran, who was an eminent civil servant and who knew and worked with Isaacs, that the Australian Government of J.H. Scullin early in 1930, after considering the names of Isaacs and Sir John Monash, decided to recommend Isaacs to the King for appointment as Governor-General. Garran was certainly well placed to know, and he appears to have had no doubt about the matter. Sir John Monash was a distinguished soldier and engineer, and he commanded a very high standing in the Australian community. His most recent and authoritative biographer, Geoffrey Serle, however, expressed doubt about Garran's statement. He says that there is no evidence that Monash was sounded out, and that there were personal reasons why Monash would not have seriously entertained the proposal. In the press speculation at the time, Monash's name was mentioned, as were the names of Sir Adrian Knox, whom Isaacs succeeded as Chief Justice of the High Court of Australia, and of Sir Harry Chauvel, a distinguished Australian soldier. Among non-Australians, Field Marshal Birdwood, who had commanded Australian troops in the First World War, was named, and it appears that he was the preferred appointee of the King. When Isaacs' appointment was announced, Monash wrote to congratulate him on "this culmination of a great career". These two eminent Australians, both Jews and both the Australian born children of migrant parents, knew one another, but, it seems, not very well or closely.

There is not much which I know that can be usefully added to the account of Isaacs' life and activities as Governor-General. I refer in the text to events surrounding the dispute between the Commonwealth Government and J.T. Lang, Premier of New South Wales: Lang was dismissed from office in May 1932 by the Governor of New South Wales, Sir Philip Game, for breach of the law. I wrote that the State Governor's action was taken without any consultation with the Governor-General, and there is some confirmation of this in an interesting account of these events and of the relations between Game and Isaacs, in Bethia Foott's *Dismissal of a Premier*. She was the daughter of Sir Philip Game's private secretary, and she had access to hitherto unpublished Game papers. She gives a sympathetic account of the links between the two men and their wives, and notes the "terrible shock [to the Isaacs] to find they were not welcome to so many people. The insults they were called upon to bear were quite incredible." The picture of Isaacs which emerges from her book is, however, a surprising one, of a man reluctant to discuss contemporary Australian issues and politics, and with a preoccupation with biblical history and scholarship. So Lady Game wrote to her mother: "He [Isaacs] never speaks of Australian politics. When Philip would like to discuss it [sic] with him, he reverts to the Palaeolithic Age..." Lady Game specially noted the fear on the part of the Isaacses of "any criticism, or of doing anything that might be criticised". On this, Mrs Foott comments "I expect it was this fear of criticism that drove Sir Isaacs every time the Governor tried to speak to him of his own troubles in New South Wales, to retire behind the centuries, craftily to emerge with a description, perhaps, of an ancient cemetery in the Vale of Jehosophat." All of this, and the account of Isaacs' endless historical narrations, while it sits comfortably with his scholarly interests, and his prolixity of exposition, is not easily reconciled with the zest, the dogmatism, the readiness for confrontation with which Isaacs habitually entered into debate on all manner of contemporary issues.

The appointment of Isaacs as Governor-General was historic in the sense that it set the modern office in place, and all subsequent appointments of Governor-Generals have been made in accordance with the procedure then followed. The appointment is made on the advice of the Commonwealth Government concerned. For Australia it appears that the recommendation is made by the Prime Minister, and not by the Cabinet, and Sir James Killen has made this point in the context of my own appointment. The Prime Minister consults as

he sees fit. It is possible within this *general* framework, which locates the source of appointment in the Commonwealth country concerned, to provide specially for other forms of identification: for example, the constitution of Papua New Guinea provides that the Crown shall appoint as Governor-General a person elected by secret ballot of the parliament. While that appears to disregard the stipulation of the Imperial Conference of 1930, that there should be informal consultation with the monarch before a formal recommendation is made, it complies with the central point, which is that the United Kingdom government has no involvement in the processes of identification and appointment.

The Isaacs appointment did not establish, and was not intended to establish, that *only* an Australian was qualified for appointment. The book takes the history up to the appointment of Lord Casey in 1965. He was the third Australian born occupant of the office, and he was Governor-General when the book appeared. He had been appointed on the advice of Sir Robert Menzies, in such matters a strong traditionalist, and he was followed by a succession of Australian citizens and residents. Sir Paul Hasluck, Casey's successor, judged that "the pattern had been clearly laid down for appointing Australians as Governor-General." More recently the Australian Constitutional Convention has proposed that the office should be occupied by an Australian citizen and resident, and this seems altogether sensible. If Australia, as an indisputably independent nation, retains the monarch as Head of State, it has to be accepted that she will necessarily be, for the most part, an absentee. Because of this, it is altogether appropriate that the Governor-General, who, *de facto*, performs virtually all Head of State functions, should be a person fully attuned to the institutions, character and style of Australia; should be an Australian. The argument against a "local" man, so vehemently asserted against the appointment of Isaacs, now stands reversed; the contemporary institution of the Australian constitutional monarchy draws strength from the close identification of the working *de facto* Head of State with the nation which he serves as Governor-General.

III

My own association with the Governor-Generalship has led me to take this late chapter of the life of Isaacs out of sequence. Let me now refer briefly to matters in the text which call for amendment. Generally, the text is preserved as it was printed in 1967, save that actual errors of fact or misprints have been corrected, and hopefully, all of these have

been identified. Then there are statements like "forty years on" which have been left standing, and the reader is invited to do his own arithmetic, adding a quarter century or so to take account of the passage of time. There are other cases where the text was accurate at the time of publication, but where that is no longer so. For example, at pages 26 and 100 reference is made to the fact that Isaacs, as Attorney-General of Victoria and of the Commonwealth, carried on an extensive private practice as a barrister and encountered criticism for his action in doing so, but defended it vigorously. It was not a good practice; it was and is desirable that the Attorney-General, and more generally, Ministers, should be required to attend exclusively to public business. In the Commonwealth, and in most states, this is now generally recognised by ministerial codes of practice relating to engagement in a profession or business and directorships of companies. Again at page 65, in the discussion of deadlocks between the two Houses of the federal parliament, it is said that there had only been two simultaneous dissolutions in Australian federal history, in 1913 (that anyway was an error, it was 1914) and 1951. Since that time there have been such dissolutions in 1974, 1975, 1983, and 1987. This is not the place in which to discuss these later cases and their complexities and outcomes, but simply to draw attention to the events. Then on page 87 I spoke of the organisation of the High Court of Australia. Since 1980, the year in which the High Court building in Canberra was opened by the Queen, the principal registry of the Court has been in Canberra. The Court now has its principal seat and workplace in the seat of government, though provision is made in the calendar for sittings in other state capital cities.

IV

I have been greatly assisted by the reviews of the book which followed its publication in 1967. The reviewers included scholars in law and politics; the late Professor John La Nauze, biographer of Alfred Deakin and an eminent historian, ran a critical and helpful historical tape measure over it. Men who knew Isaacs contributed their personal knowledge and judgments, and of special interest in this respect was the review by John Keating, who was the son of a federal ministerial colleague of Isaacs, and who, as a very young man, served as his associate in the High Court for a period of years. Sir John Barry contributed an essay review entitled *From Yackandandah to Yaralumla: — The Enigma of Isaac Isaacs* which was published in the Melbourne literary magazine *Meanjin.* Barry was a Justice of the

Supreme Court of Victoria, a lawyer with wide ranging interests. He could have known Isaacs from the latter 1920s, and certainly came to know him at a later time. Barry's point in speaking of the "enigma" of Isaacs was that it was very difficult to know the private man. Isaacs declined to write a personal account of his life and work; he said to Barry that the record was available in the public domain in the pages of Hansard and the Convention debates and in the law reports, that it was by this record that he wished to be judged, and not by any *apologia pro vita sua*. Both Barry and Keating said that this made it extremely difficult, if not impossible, for the biographer to uncover the man. Certainly it was difficult and often frustrating to write about him in the absence of any substantial, let alone systematic, collection of personal papers. For a time, having read and made use of the extensive public record, I put aside the writing, stalled by the lack of material which would throw light on Isaacs as a person. Then by good fortune, a Melbourne solicitor gave me a box of papers, books and cuttings which included correspondence between Isaacs and his mother. The box also contained Scullin's account to Isaacs of his dealings with King George V and with his private secretary, Lord Stamfordham, in 1930, which Isaacs set down in longhand, and which is printed in full in the chapter on the Governor-Generalship. This was a timely rescue; the manuscript was receiving the attention of silverfish.

Then a collection of family letters from Isaacs to his daughter Marjorie, Mrs David Cohen, was given to me by her. These date from the period of the Governor-Generalship, and continue into the years of retirement. I made substantial use of these, and they encouraged me to go forward. Overall, the point made by Barry and John Keating still remains true, that it is difficult to bring Isaacs fully to life, to *know* him, though new fragments of information and letters still come to me from time to time from a variety of sources and kindle their small light. For example, I was sent a batch of letters written by Isaacs in the 1930s to a man who was employed as chauffeur to Isaacs' brother John and his sisters in Melbourne, and he reported to Isaacs on their health and well being. Isaacs' care for and concern for his parents, and his brother and sisters, was constant and deep, and at times, as Barry says, excessive. So he writes.

> His family loyalties were strong to the point of irrationality and his partisanship in the litigation arising out of his brother John's marriage was enthusiastic and undignified ... It is saddening to see a man of Isaacs'

eminence in the law and public life behaving with a venom and lack of reason that would have been inexcusable even in a vexatious litigant.

I wish that it was possible to know more about Isaacs' parents, and particularly about his remarkable and formidable mother. The marriage certificate of Alfred Isaacs and Rebecca Abrahams locates them in East End Jewish London, in working class areas. Rebecca was the daughter of Abraham Abrahams, styled a dealer, which may well have meant a street hawker; Alfred was the son of Isaac Isaacs, deceased. Rebecca's death certificate gives her mother's maiden name as Joel. The records lead us no further, and we have nothing to amplify the picture of this remarkable woman, or to help with a better understanding of her relationship with and her influence upon her son Isaac. Barry says that she was unquestionably the most potent external influence upon him; that he owed a great deal to her encouragement and her belief in him, but this was at a cost of a possessiveness that later interfered with his married life. Mother and son were in constant touch and his desolation, when she died at a great age in 1912, was the most shattering experience of a life that was happily free of great sorrows.

When I was writing the book, I went to speak with the late Sir Owen Dixon who had known Isaacs from days when he appeared before him as counsel in the High Court, and who sat with him as a fellow judge of that Court for a short period, and kept in touch with him in later years. Dixon said to me that a key to the understanding of Isaacs was to be found in the events of the *Mercantile Bank Case* in 1893, which led to his resignation from his first public office as Solicitor-General. From that time onward, Isaacs was distrusted by many of his peers. Whether that be so, there is the evidence of Deakin and of Garran, well placed contemporaries who knew him, and who had opportunities to observe at close quarters, that he was not trusted or liked, that to support a cause or case he was disposed, at times, almost naively, to resort to stratagems. I have heard repeated stories about Isaacs from men of high standing in the law, who must in turn have had them from an older generation, which tell of Isaacs' tricks and contrivances. The issue is not whether these stories were true; it is that they were told and repeated in successive generations. Barry said that it was the case that while Isaacs possessed great talents and pursued his aims with relentless and unflagging energy, his egocentric personality and his dogmatism throughout his career exasperated and repelled men who were closely associated with him at the Bar, in politics and on the Bench, and denied him the trust and affection that

were readily given to others of far lesser abilities but more generous outlook.

These are the words of a man who in his own maturity knew Isaacs, and who admired much of what he was and did. He was, however, able to stand off and make a cool and frank judgment, free of the prejudice which affected the views of others. There is however another side to the story. As I wrote, there were people who knew him, whose lives touched his, who rendered service to him, friends and correspondents, who speak with the greatest warmth of his character, his kindness, tolerance and generosity. John Keating came to Isaacs in 1926, and remained with him for more than four years. He wrote at length "In Defence of Sir Isaac Isaacs" after the book appeared.

> It remains to me a matter of puzzlement that anybody who came to know Isaacs as a person could feel other than great warmth and affection towards him...This 'insensitive' man was indeed deeply sensitive to anything said or done which might be damaging, hurtful or even mildly discomforting to another, and he would take precautions to guard against it...he had a profound respect for the dignity of the human personality...He had an admirable patience. I never saw him become irritable, far less lose his temper. Emotional I believe he was, and with an inner intensity, but he was faultlessly controlled and he was probably incapable of being provoked.
>
> Isaacs had profound human compassion. Accounts of cruelty or harshness would bring tears to his eyes. He seemed always ready to offer some explanation for discreditable conduct on the part of others, or a failure to live up to standards.
>
> ...It is perplexing that the personality traits which to me were endearing should seem to be interpreted by some as surprisingly even grotesquely otherwise.

This is a deeply sensitive statement by a man who when young was close to Isaacs and who felt very deeply and positively about him. He was not alone; Sir Irving Benson in his review, which was in large part an account of his own friendship and personal association with Isaacs, gives a very favourable picture of his personal qualities. I made this point in writing the book, but on rereading it I am concerned that I should present the persona of Isaacs as fairly and fully as I can. The picture of Isaacs provided by Keating does not sit easily for example with the relentless and overbearing Isaacs of the Zionist controversy days. By that time, of course, he was a very old man. At the end, I have to say, that I believe that all of these elements were in him, that he revealed himself differently to those with whom he met and worked

in public life, and to those who like Keating served him in various capacities and met him in the course of everyday life.

There is little that I can add to what I have written about Isaacs' Jewishness. Sir Irving Benson, himself a Protestant clergyman, wrote in his review-memoir that religion was the main interest of Isaacs' life and John Keating endorsed this. I believe that the truth lies in what his friend and correspondent Rabbi Jacob Danglow told me, that Isaacs had a deep and continuing interest in Jewish (and other) religious doctrines and writings, and studied and wrote on them extensively. That interest was not however expressed in the practice of religious observance as evidenced by synagogue attendance, personal religious devotion or in active participation in Jewish community affairs. Isaacs, moreover, saw Jewishness exclusively as a matter of *religion*; he was deeply hostile to any notion of Jewish "ethnicity" or to any formulation of Jewish identity which went beyond religion into race or nationality. So in 1906, while he was Attorney-General of the Commonwealth, he intervened in a community debate in Melbourne strongly opposing the establishment of a Jewish Board of Deputies to support and to act on behalf of Jewish interests. His principal objection was that such a Board would serve to emphasise the separateness of the Jewish community, and would set up an additional barrier between it and the outside world. He put his characteristic stamp on this debate by referring to the "unwarranted arrogance" of those who advocated a representative board.

This was a central element in his position in the Zionist debate of the 1940s. In his view, Australian Jews were Australians, specifically British subjects of the Jewish faith, and he saw the actions of the protestors to which he was opposed as profoundly threatening to that position. It was the genius of British institutions which had made it possible for him to reach the great heights which he had attained in the Australian community, and it afforded such opportunity to all citizens who, whatever their religious faiths, shared a common civic bond of citizenship. I see it as very important to understand this central point in Isaacs' thinking, and it was by no means unique to him.

Over the first three decades of the Commonwealth of Australia Isaacs was closely engaged with the law as a leading barrister, as a parliamentarian, Attorney-General, and then from 1906–1930 as a Justice, and at the end as Chief Justice of the High Court of Australia. In the text I have given an account of this centrally important area of

Isaacs' life and work, and particularly of his work as a member of the High Court Bench. Notably in the account of the judicial interpretation of the Constitution, this takes us into areas of some technicality and as Sir John Barry says, it may leave the intelligent layman at times a little puzzled. I have endeavoured to write plain English as best I could, but my first concern has been to trace the evolution of his thought as accurately as possible. I have also discussed the personal relationships between Isaacs and his fellow judges, particularly Sir Samuel Griffith, the first Chief Justice of the High Court, and Sir Edmund Barton who retired from the Prime Ministership to take a foundation seat on the Court. Since the book was published, a major biography of Griffith by a historian and lawyer, the late Professor Roger Joyce, has appeared and it confirms that the relationship between Isaacs and Griffith was uncomfortable, often hostile. Isaacs, as a private member of Parliament, had not approved the appointment of Griffith as Chief Justice. He said, "I look upon Griffiths [sic] as a past number. He struck me as just a bit 'frayed'." Further, there is no evidence that Griffith was consulted when Isaacs and Higgins were appointed in 1906. Barry was not old enough to have seen it for himself, but he gave an effective picture of the two men and their relationship.

> Griffith was a man of decisive mind who dominated the court. He was as positive in his beliefs as Isaacs and it was inevitable that they should disagree. Each was skilled in intrigue and relentless in pursuing his viewpoint, but while Griffith was masculine and at times brutal in his forthrightness, there was an element of the feminine about Isaacs' approach and methods. Their dislike and their differences were barely concealed. Isaacs was an intensely proud and emotional man, but he had schooled himself in massive self-control. When he thought himself slighted, the signs of inward anger, the quivering nostrils, the tautened mouth and the darkened expression were rarely followed by an impulsive utterance, but his resentments were disclosed in the polemical language of his judgments.

When Griffith resigned from the Court in 1919 he recommended the appointment of Adrian Knox as his successor. This was intensely disappointing and hurtful to Barton who had been Griffith's close colleague and hoped to succeed him. Barton was unwell and died shortly thereafter in 1920. It seems that Griffith wished to ensure that the Chief Justiceship did not go to Isaacs, and friendship and long association with Barton took second place to this.

I have devoted a long chapter to Isaacs' constitutional doctrines as they evolved over a quarter century on the High Court. He came to be the preeminent and unwavering expositor of the theme of an expanding national power. He would have taken satisfaction from the High Court's decision in the *Concrete Pipes Case* which overruled *Huddart Parker v. Moorhead* and approved Isaacs' dissenting view in that case of the scope of the Commonwealth's corporations power. He would surely have applauded decisions of the High Court at a later time giving broad scope to the external affairs power, though it is not surprising that the issues which arose in those cases came up at that later time when Australia's position as an independent state was more clearly established. In his lifetime he roundly attacked interpretations of the scope of section 92 of the Constitution which were at variance with his own.

On the Bench and in writing and advocacy after his retirement, he untiringly argued for constitutional reform which advanced the national power. This is a cause which has had meagre success. In the text I referred to the report of the Joint Parliamentary Committee on Constitutional Review in 1959. Its recommendations were not followed up. Since that time there have been other initiatives. In 1973 the Australian Constitutional Convention was established as an initiative of the Victorian legislature. It was comprised of members drawn from all chambers and political parties in the state and federal parliaments and from local government. It met in all State capitals between 1972 and 1985 and the Convention, its committees and sub-committees produced a substantial body of material relevant to constitutional reform. This course was abandoned in 1985 when the Attorney-General of the Commonwealth announced the appointment of a Constitutional Commission of six individual members with comprehensive terms of reference, which was to be advised by five specialised advisory committees. I was Chairman of the Advisory committee on the executive power. The Constitutional Commission published a detailed and valuable final report in 1988.

So far that initiative has produced no positive outcomes in constitutional change. The most recent initiative has come out of non governmental action. A conference with broad based membership was held in Sydney early in 1991 to mark the centenary of the National Australasian Convention which met in Sydney in 1891 and prepared a draft constitution for a future Commonwealth of Australia. The 1991 Conference resolved to establish a Constitutional Centenary

Foundation under the chairmanship of a former Governor-General, Sir Ninian Stephen. It is done with the intent that the Foundation will encourage wide ranging debate on constitutional and cognate issues which may in turn yield useful, but not yet defined outcomes in the course of this decade at the end of which the centenary of Australian federation will be commemorated.

I hope that this reprint of the life of Isaac Isaacs may be a useful contribution to our learning about our nation.

Zelman Cowen
September 1992

PREFACE TO THE FIRST EDITION

The task of writing this life of Isaac Isaacs has not been an easy one. His papers were not systematically preserved, and many valuable sources of information have disappeared. There are of course official records: the debates in the Victorian and Commonwealth parliaments, the proceedings of the Federal Convention of 1897–8 in which Isaacs took part, and the Commonwealth Law Reports in which Mr Justice Isaacs' copious judgments are spread over many pages. There are also Isaacs' writings on various subjects, press reports, and the writings of contemporaries like Alfred Deakin and Sir Robert Garran.

I am indebted to Mr Newton Super, Solicitor, of Melbourne, for making available to me a collection of material which included books of press cuttings kept by Isaacs, and various letters and documents, including some remarkable correspondence with his mother, Rebecca Isaacs. Isaacs' handwritten note of what Mr J. H. Scullin had told him about the events leading up to his appointment as Governor-General was among these papers. Mrs Marjorie Cohen, Isaacs' daughter, generously gave me access to a large number of family letters written by him. These dated from 1934, when he was Governor-General, and the last of them was written only a few months before his death. Professor Julius Stone made available his files which covered the unhappy events of the early 1940s, when Isaacs was deeply embroiled in Zionist quarrels. I am grateful for all this generous help which enabled me to write with a deeper understanding, and I should also like to thank others who made letters, photographs and other material available to me.

There are many people who knew Isaacs and they took much time and trouble to give me their impressions and recollections of him. I would also mention particularly Sir Owen Dixon, who as counsel frequently appeared before him in the High Court, and was later his colleague on the Bench of that court, Mr John Keating, his last associate, and Mr Keating's sister, Mrs Tulla Brown of Canberra, Mr

John Reynolds of Tasmania, the late Percy White, who painted his portrait, the late Rabbi Jacob Danglow and the Reverend Sir C. Irving Benson.

There are others who helped me with my research. These were members and former members of the academic staff of the Law School of the University of Melbourne and I would specially mention Mrs Susan Morgan and Miss Anthea Mackay, Messrs Clifford Pannam, Jack Faijgenbaum, Eliot Rothenberg and Ikenna Nwokolo. My colleagues Professor Colin Howard and Mr Maurice Cullity read the manuscript and made very helpful criticisms and comments.

My friend Julian Phillips, Sub-Dean of the Law School of the University of Melbourne, generously undertook the ungrateful task of preparing the index. Miss Florence Scholes, my secretary in the Law School at Melbourne, on this, as on so many occasions over the last sixteen years, gave me invaluable assistance and prepared an admirable typescript.

Isaac Isaacs was written while I was Dean of the Law School of the University of Melbourne. It was in no small part the stimulation of association over many years with colleagues who were first rate scholars and people that encouraged me to write such books as this, and to them I express my deepest gratitude and admiration.

Zelman Cowen
University of New England,
Armidale, New South Wales.
February, 1967.

CONTENTS

1

The Early Years

ISAAC ALFRED ISAACS was born in Melbourne on 6 August 1855, and was the first child of Alfred and Rebecca Isaacs. Not a great deal is known about the early life of his parents: Alfred Isaacs, the father, was a Jew, born in Russian Poland, who had learned the tailor's trade. During the 1840s, with little financial resource, he made his way westward across Europe and settled in London where, it may be assumed, he found work in his trade, and there he married Rebecca Abrahams in 1849.

Throughout her life, Rebecca Isaacs exercised a very powerful influence over her son Isaac. She emerges as a much clearer figure and as a stronger personality than her husband. How they met and married remains something of a mystery. She was older than her husband. He was a foreigner, with little English and little general education and, one may guess, without too much strength of personality. Mrs Isaacs was born in England and such of her letters as survive confirm by calligraphy and style that she wrote English with the greatest facility. What formal education she had, and where she received it, we do not know; it is said by her granddaughter that she had been a teacher. She certainly had a powerful mind and wide-ranging intellectual interests and the capacity to understand and discuss complex matters.

Alfred and Rebecca Isaacs migrated to Australia in 1854, and their ship, the *Queen of the East*, arrived at Sandridge, the port of Melbourne, in September. The city, crowded to a point of acute discomfort as a result of the vast migration which followed the discovery of gold, must have presented a daunting spectacle to impecunious migrants from Europe. A contemporary account tells that:

> house accommodation was totally inadequate to meet the demand for shelter from the thousands who were pouring daily into the

> Colony. . . . Tents had been put up by many on the vacant ground round the city; but the increase of numbers rendered it necessary to appoint some spot for the express purpose of accommodating those who had no other means of getting shelter . . . [the scene was] the most picturesque and singular that could be imagined. With the exception of the holes, it was like some of the diggings and here were located some 5000 individuals. . . . The cooking fires outside the tents were in full operation at midday, preparing the principal meal, and active hands were to be seen busily employed in this very necessary operation.
> . . . The pure air of the climate, its mildness, and the solubrity [*sic*] of the situation rendered a tent at 'Canvas Town' decidedly preferable to a *share* of a room in an inn or boarding-house in the city of Melbourne.[1]

'Canvas Town' itself was an improvement on a situation which had been much worse. The correspondent of the *Sydney Morning Herald* wrote, on 4 November 1852:

> that a worse regulated, worse governed, worse drained, worse lighted, worse watered town of note is not on the face of the globe; and that a population more thoroughly disposed, in every grade, to cheating and robbery, open and covert, does not exist; that in no other place does immorality stalk abroad so unblushingly and so unchecked; that in no other place does Mammon rule so triumphant; that in no other place is the public money so wantonly squandered without giving the slightest protection to life or property; that in no other place are the administrative functions of government so inefficiently managed; that, in a word, nowhere in the southern hemisphere does chaos reign so triumphant as in Melbourne.[2]

Immigrants arriving at the port found appalling difficulty in obtaining accommodation. Prices generally were very high, and unhappy arrivals were mercilessly fleeced for the transport of themselves and their baggage to town. A railway to Sandridge was quickly constructed and it was opened in September 1854, a few days before the Isaacses arrived. The population of the city was growing very fast; in 1854 it was 80,000, and by 1861 it stood at 126,000, a fivefold increase in a decade. Of these 37,000 were living in the city area, including Carlton and East Melbourne. The state

[1] P. Just: Australia (Dundee 1859) at pp. 111-14. Reprinted Grant and Serle: The Melbourne Scene 1803-1956 (Melbourne University Press 1957) at pp. 90-1.

[2] Quoted Serle: The Golden Age: A History of the Colony of Victoria 1851-1861 (Melbourne University Press 1963) at p. 67.

of affairs depicted in the newspaper correspondent's account reflects the incapacity of the authorities to deal with pressures of this magnitude. It is interesting to reflect on the public priorities in this difficult situation. In April 1855 the first term of Melbourne University was opened by the Lieutenant-Governor, and the Chancellor, Mr Justice Redmond Barry, reminded his audience that:

> we are engaged this day in throwing open, for the first time, the portals of a great institution, founded in the second year of the political existence of the country, at a time when the convulsions of domestic perturbations filled all but the most constant with apprehension and alarm.[3]

The founding of the university was certainly an act of imagination and faith, and although it surely meant nothing then to bewildered and struggling migrants like the Isaacs family, twenty years later it was to provide for their son a well-established institution in which to pursue his law studies.

By September 1854 conditions had improved somewhat. But the situation was still very bad and uncomfortable, and to other difficulties was added economic recession as the gold prosperity fell away. For people of little financial strength, the situation must have been grim, almost overwhelming. What moral resources the family mustered to face life in a strange and tumultuous city we cannot know; but we may guess that Mrs Isaacs possessed then, as later, the formidable strength of character which prevented them from drowning in a sea of difficulties. There was already a sizeable Victorian Jewish community of over 1500, largely concentrated in Melbourne and with a religious leader. The influx of Jewish migrants created problems for the local community and quite serious inroads were made on the very limited funds of the local Jewish Philanthropic Society, which sent a letter to the Jewish Emigration Society in London drawing attention to the evils of sending impecunious Jewish migrants to Australia.[4] Whether the Isaacs family turned to the Jewish community for assistance, we do not know.

They found a shop-dwelling in Elizabeth Street where Alfred Isaacs worked at his trade and where they lived, and there Isaac Alfred Isaacs was born. Shortly thereafter a move was made to

[3] Argus newspaper, 14 April 1855; reprinted Grant and Serle, op. cit., at p. 105.

[4] L. M. Goldman: The Jews in Victoria in the Nineteenth Century (Melbourne 1954) at p. 124.

79 Stephen Street (now Exhibition Street) and, in 1858, to 108 Lonsdale Street. A second son, Braham, was born there in that year, but he died in early infancy.

In the latter fifties the economic situation in Melbourne declined more sharply, and building and industrial activity diminished. This made other centres more attractive and the inland gold towns attracted many people from Melbourne. Among these was Beechworth, which had the support of a flourishing agricultural neighbourhood, a steady building industry and the support of reasonably steady gold production. Not far from Beechworth, the smaller town of Yackandandah was also a gold centre which, from mid 1856, attracted a substantial mining population. The Isaacs family, which had had little success in Melbourne, resolved to seek better fortune in the north-east of Victoria, and in the late spring of 1859 moved to Yackandandah. At that time there were some three thousand people there, mostly miners who came from diverse national backgrounds, including Chinese. At Yackandandah, four more children were born: Carolyn (Carrie), Rosetta, John Alfred and Hannah. Rosetta died at a very early age, and little is known of Hannah's later life. Carrie never married, and John became a solicitor and for a time a member of the Victorian Legislative Assembly. He married late in life. Carrie and John lived on after the death of the Isaacs parents at the family house in Auburn, and Isaac Isaacs maintained a very close and affectionate relationship with them.

Isaac Isaacs often spoke of the influence of his mother in these early years, and it is from his statements to others that we have a little information about his earliest education at her hands. She had a strong interest in biblical and general literature and this she communicated to him; she also presumably gave him his first instruction in elementary skills. He appears to have gone to a small private school run by a Mr Eggleston in Yackandandah, and then, at the age of eight, to the Yackandandah state school when it was first opened. When he was twelve, in 1867, the family moved once again to the larger town of Beechworth where he attended first the Beechworth common school and then the Beechworth grammar school, where his academic performance was very good. In 1870 he passed an examination to qualify as a pupil teacher at the local common school and he taught there until early 1873, when he became an assistant teacher at the Beechworth state school, which had replaced the common school. In 1875, as a result of a dispute with the headmaster of the school, he resigned from the teaching

service, and had the chastening experience of conducting an unsuccessful County Court action against the headmaster for fees alleged to be due to him. Thereafter he taught for a few months at the grammar school, and then, through the good offices of G. B. Kerferd, then member for Ovens in the Victorian Legislative Assembly, he secured an appointment as a clerk in the prothonotary's office in the Crown Law Department. In that office, court documents are filed. Isaacs found lodgings in Melbourne, and for the time being the rest of the family remained in Beechworth.

In the prothonotary's office, Isaacs had extensive experience in common law work and in practical legal matters generally, and gained a considerable familiarity with the working of the courts. During these years he studied, necessarily part-time, for the degree of LL.B. at the University of Melbourne. He had signed the matriculation roll of the university on 23 December 1874, and was student number 828 on the roll. He began his law studies in 1876. The Faculty of Law of the university then had as its Dean Dr W. E. Hearn, and a teaching body of four part-time lecturers, among them Thomas a'Beckett, who later became a member of the Supreme Court Bench. In his first year—strangely removed from the law courses of a later day—Isaacs passed in the required subjects of Junior Greek and Latin and in Lower Mathematics and Ancient History. For the first three years of his course his performance was surpassed by that of T. a'B. Weigall; but in the final year he overtook his formidable rival for academic honours, though both men were placed in the first class.[5] The degree of Bachelor of Laws was conferred on him in April 1880, and the degree of Master of Laws after due effluxion of time (for it was then awarded without further examination to any candidate to whom honours had been awarded at the fourth year LL.B. examination) in 1883.

It was a considerable performance, and a characteristic one. Isaacs worked very hard, and a student notebook of 1879 which survives is a model of precision and clarity in its brief statement of doctrine and principle, and in its excellent summary notes of decided cases. Stories of Isaacs' assiduity and remarkable memory date back to these hardworking student days. Sir Robert Garran, who was

5 Weigall practised for many years at the Equity Bar in Victoria and became an Acting Justice of the Supreme Court of Victoria in 1923. He died while still holding that office in June 1926.

closely associated with him when Isaacs was Attorney-General, wrote:

> Isaacs had an extraordinary photographic memory. It is said that at his Bar examination, he cited a huge number of cases with reference to volume and page. The examiners were so startled that they asked the supervisor whether he could possibly have had access to a notebook or a library during the examination.[6]

Isaacs remained in the Crown Law Office until 1882, when he made the decision to go to the Bar, and he took chambers in the old Temple Court in Collins Street. The memorandum of agreement is preserved. Dated 18 April 1882, Isaac Alfred Isaacs of Melbourne, Victoria, Barrister at Law, agreed to take Chamber 39A from 1 May on a monthly tenancy at a rent of £2 and five shillings service. Temple Court was at that time the home of many Melbourne barristers. Isaacs practised from Temple Court until 1899, when he moved to chambers in Chancery Lane.

John Isaacs joined his brother in Melbourne in the early 1880s. He entered the profession by way of the articled clerks' course, and the records of the University of Melbourne show that he passed in the first and second year subjects of that course in 1882 and 1883. He was admitted to practice in 1887.

The other members of the family remained in Beechworth until 1886, when Isaacs brought them to Melbourne. In 1888 a two-storey Victorian house was acquired at Number 1 Goodall Street, Auburn. The title was first registered in the name of the father Alfred Isaacs. The property remained in the family until it was sold in 1940 and is now occupied as flats. It is remembered as a rather gloomy cluttered Victorian house, in which, as already recounted, Isaacs' spinster sister Carrie (who died in December 1933) and brother John lived on for many years after the deaths of their parents.

The story is often told that Rebecca Isaacs came to Melbourne when Isaacs was admitted to practice; that she joined him in choosing his wig, and then told the wig-seller that she would be back in due course for a judge's wig, an undertaking which she made good. She was an ambitious and dominating woman who exercised a very strong influence over a son who was himself a man of

[6] Prosper the Commonwealth (Angus & Robertson 1958) at p. 157. Garran was then Secretary of the Attorney-General's Department.

powerful character, great ambition and iron determination. Not much survives from these early days to give us insights into her character, though there is one letter written by her from Beechworth in July 1884. It is written to both her sons in a strong, clear, and elegant hand, and it is so interesting as to merit quotation in full.

Beechworth

July 15th 1884

Pray God Almighty bless you both constantly with every possible Joy Comfort, Happiness and every Blessing in His gift Pray God keep His all protecting hands at all times spread over you both to Shield Guard and Protect you both from every trouble and danger And not allow anything or any person to hurt or injure either of you in anyway whatever And keep you both in Constant and perfect Safety Security and Happiness

My Dear Darling Blessed Pets of Boys Isaac and Jacky

Your dear and very welcome letter to hand Thank God you are both quite well as we all are

I am very glad Isaac pet that you like the Trowsers daddy thought they would be your style.

In regard to the Amalgamation of the profession I remember the late Mr Ramsay fighting against it some years since I know that Gaunson and McKean were very much in favour of it and I know that Quick and Wrixon spoke on the subject but whether they spoke in favour of or against the bill I dont know My opinion is that Kerferd is vexed that he has not been patronised and thinks the lawyers have been neglecting him and out of jealousy he is trying to reduce both branches and Dr Hearn is helping him Pray God keep Kerferd from being a Judge[7]

Now supposing the bill passes the Upper House and people like to go for advice to a barrister in preference to a lawyer would a barrister be compelled to charge according to the scale of fees marked out for lawyers or could they make their own charges (I believe the lawyers fees are much reduced) I think all this has been brought about by members of the profession who get but little to do Were you at the meeting of barristers the other day I saw an account in the paper where Webb was chairman I did not think Webb would propose such a thing as he brought forward because he gets such large fees and I think it looked mean on his part

Isaac darling I have sent you a slip from a London journal that purports to be the first poison Act that was passed in England I

[7] The prayer was not heeded. Kerferd became a Justice of the Supreme Court in December 1885.

dont suppose there is much difference in the modern law as far as relates to poisons but still I thought I would send it to you

Jacky darling the likeness that was sketched in Court the other day be sure to get one for me if you can whenever you have the chance And as to your dear old Phiz please God all is well I expect daddy will be down next month and then he will go with you to get it done How quickly time goes it does not seem long since he was in Melbourne does it and now the time is near at hand for him to go again

I am very glad to hear that Godfrey and Bullen are right I was afraid they were in someway offended as I had not heard of them for a long while

Well darlings no news to tell you about

Pray God Almighty bless you both constantly with every possible Joy Comfort and Happiness and every possible blessing And keep His all protecting hands at all times spread over you both to Shield Guard and Protect you both from every trouble and danger and not allow any person or thing to hurt or injure either of you in anyway whatever Pray God keep you both in constant and perfect Safety Security and Happiness and be to you both Guard Guide Protector Benefactor Counsellor Director Preserver Monitor Mouthpiece Instructor Defender Shield and Friend in everything both of you say and do and bless you both in every one of your words and actions And pray God spare you both in your full Health Strength and all your Faculties for very very very Long very very very Happy very very very Successful very very very Prosperous and very very very Honourable Life

Pray God bless you both now and always in every possible manner

We Remain my Dear precious old pets your ever fond

Loving and affectionate Parents

Alfred and Rebecca Isaacs

The notable features of this letter are not only the strange and verbose prayers which top and tail it, but also the able and confident discussion of the politics of amalgamation (the fusion of the professions of barrister and solicitor), the firm judgments on men in the profession, and the reference to and the enclosure of the passage relating to the Poison Act. In this respect, anyway, it seems more like a man's letter, and one written with considerable confidence and assurance.

Isaacs kept in close and daily touch with his mother. When he was a Justice of the High Court and away from Melbourne, he maintained daily contact with her by telephone, telegram or letter. Some of these letters survive, and they too are extraordinary, particularly

when it is remembered that they were written by a man who was now past fifty. One from Tidswell's Hotel, Coogee, where Isaacs was staying while in Sydney, begins:

Sunday evening
December 13, 1908

My sweet darling Mammie

I have been into town and had my wire talk with you and the starlets; and as I am not going to Chambers tonight to do any work I feel disposed to say a few words to my old chummie . . .

There follows some account of what he has been doing and where he has been, and then he launches into a lengthy religious and biblical discussion with particular reference to the Book of Ezekiel. This letter is incomplete.

A little more than a month later there is a letter from Macedon where, for many years, at his house Marnanie (named for Marjorie and Nancy, his two daughters) he was to find pleasure and recreation.

Macedon
Friday evening Jan. 29/09.

My sweet darling blessed Mammie,

It seems an awful long time since I saw your darling face and yet it is only a few minutes since I heard your dear voice saying 'Spiffin' and all sorts of nice things to your big baby boy. I was a bit surprised this afternoon when I 'phoned, and Bella told me you were out for a drive. Of course there was a lovely change in the weather, and as the Schnorrer[8] says in our friend Zangwill's book 'If you don't do it then when you can you . . .' You recollect the salmon story don't you?

There was no house that just suited today—price, and quality, and terms of lease etc. So we must wait a bit.[9]

I have not time to write one of those letters that Carrie is so fond of and so I am sure she will excuse me. I have only read a few pages of the Book we were enjoying together dear, this time last night—'The Synogogue and the Church'—and consequently I have not the means even if I had the time to write anything at length. But there is one passage that can bear quoting and that I think you will enjoy. The author

'The Jews unaided and despised have fought for over 2000 years,

[8] Yiddish for mendicant.

[9] This reference is not clear. In 1899 Isaacs acquired land in Macedon on which his house Marnanie was built. He acquired additional contiguous land in 1906.

and are still fighting, the battles of the human conscience, not with the might of the flesh, but with that of the spirit.'

And he reminds us of the heroic struggles of the Maccabeans—and adds what I didn't know and what is extremely singular. The martyr Eleazor one of the Maccabeans was honoured in the ancient Church as the first martyr, and he together with the mother and her seven sons were converted into Christian martyrs and saints, the Saints Maccabaei. They had a regular saints' day, viz. August 1, and in Rome you could see the relics, sacred relics of these Christian martyrs.

And why did the Jews so struggle? Goethe, the German poet, says—and he is no friend to the Jews—that they did so 'to glorify the name Jehovah throughout all time'.

Well, darling, I haven't been able to say much to you. But there is a story that strikes me as very much in point. Rabbi Simon used to say if three have eaten at table and have not spoken of the Torah[10] it is as if they had eaten of idolatrous sacrifices, but if they eat at table and talk of the Torah it is as if they ate at God's table. So if we have a chat by letter, and say something about this great subject, be it ever so little, it is to some extent satisfying. And so I have put a little bit in this. And now Mammie darling I want to say that (p.G.) I shall probably be down again Tuesday and stay a little—certainly over night with you dear. '*The moth seeks the Star.*'

God Almighty bless you darling and keep you well, and so with kisses and hugs I am yours ever

Isaac

There is a very strong Jewishness in this letter which suggests a close attachment to religious observance. This certainly was not true, if religious observance in the formal sense of synagogue attendance and ritual observance was the measuring stick. Throughout his life he maintained a very deep interest in bible reading, and in biblical criticism and exegesis, both Old and New Testaments. He maintained written and personal contacts with clergymen both Jewish and Christian, and his last associate on the High Court, a Catholic, recalls long and detailed questioning on aspects of Catholic doctrine. But apart from the specifically religious references which may have been written in this form to please his mother, the letter discloses a strong sense of cultural Jewishness which Isaacs always possessed. At various stages in his life, in both State and federal politics, he protested angrily at anti-Semitic suggestion and reference. A fragment of another letter gives a detailed account of the contemporary Dreyfus case and emphasizes its anti-Semitic aspects.

[10] The Jewish Holy Scripture and Law.

We shall return at a later stage to consider Isaacs as a Jew. What is to the point here is the relationship between mother and son as revealed in these fragments of correspondence.

There is a very long letter again written from Sydney in mid 1909.

Wednesday evening
July 28 -09

My sweet darling clever Mammie,

T.G. you are quite 'spiffin'. I have just come back from a very pleasant chat with a notable crib champion, who deigned to defer one of her contests, and delay the discomfiture of an opponent, and spare for a few moments the torment of her victim, in order to converse with me. Don't you think her kind and considerate! Well I do! . . .

There is nothing new except the fact that I work hard during the day. I am not doing much at nights. I think it well not to stew harder than necessary. What do you think Mammie darling? I know what you will say—You will say, Of course don't work so hard at night—in fact don't do anything at night except write me a religious letter of 50 pages or so for Carrie's sake. Well all right, I will give you some out of that bottle; but can't promise to make it 50 pages. Beecher is such an attractive speaker that I hardly know what part to leave out. He makes every allowance for the times in which the various characters of the Bible lived. He says those who complain about the conduct of this Bible character and that, because it would be out of accord with public opinion now, entirely forget that their conduct must be measured by the code of society in which they lived. And as times progressed—conduct altered. And he applies that to Abraham—first called Abram. He admires that character greatly, and says this: 'The Arabian, the Persian, the Jew, the Christian, the Mohammedan, all hold in sacred reverence the name of Abram. This name is more celebrated than any other in universal history. We marvel at this, for Abram was not a military hero. He was not a founder of cities. He was not the King of an Empire. Nor was he, for aught that we know, a great thinker, a great teacher, in any particular sense of the term. No line fell from his pen. No golden sentence has been preserved from his lips. Unlike Confucius, or Zoroaster, or Buddha, or Moses, he founded no system either of philosophy, or religious belief, or of worship. He was a wandering shepherd and nothing more than that. If you would see his living image, as it exists today in real life, go to the original, the Bedouin Sheik with his turbaned head, his cloak, and his long spear. This wild chief of the wandering tribes of the East may not be your con-

ception of Abram, which is founded upon the pictures of modern artists, but without doubt it is the very life-form of the patriarch. The history of this great chief is very simple; it would seem at first as though there were but little in it for comment: and yet upon consideration, there is in it, more than be encompassed in any discourse—more than the plan of these Bible lectures will permit me to enter upon. I must skeletonise it. He was called by name, first *Abram*, that is 'Father of Elevation' or 'Great Father'; but in later life *Abraham* that is 'The Father of Multitudes', owing to the promise which was made to him that his posterity should be as numerous as the stars in the heavens, or as the sands upon the seashore. He was 'The father' preeminent. He was the founder of a nation, without being at the same time, a pretender to anything he was not. He did not profess to be a god, or a demi-god. Abraham's family were idolaters. Legend says that Terah, his father, was a maker of idols. Abram was 70 years old when he heard that inward Voice, the call of God, commanding him to leave all his associates and associations and go forth, the great emigrant of antiquity. His first move was only a march of a day or two, from Ur to Haran. For 5 years he lived there, where his father died. Then the impulse returned, which was to him a voice of God, calling him a second time; and he set his face westward. He passed the Euphrates. The ford across the river where he passed is probably there still. What this 'call' was that Abram heard, no man can now define. The impulse we cannot doubt was a high and sacred one; but it was the impulse of an *emigrant*: not that of a *conqueror*, who with a sense of ambition and conscious power went forth to subdue new territories. He went out with his small band, as an emigrant, with the promise that he should have a great posterity. It lay in the future. Whether in the dreams of sleep, whether in some appearance to the senses, or whether under the influence of vivid imagination so strong that his subjective state became objective—whether in one or other of these ways this call of God was made to Abram we are not now to determine. All we know is, that we are to suppose, not that God spoke in an audible voice out of the heavens to him, but only that Abram received spiritual impulse, knowledge, and strength which set him upon his journey. He was the father of emigrants.

Beecher then goes on in vivid language to narrate Abraham's journeyings and exploits, and then says . . . [there follow more pages]

Now Mammie darling that is the substance of Beecher's appreciation of Abraham. I have omitted the various incidents, and given only his summing up. But if such a man can so venerate the founder of the Jewish faith and race, why should we ever hesitate to own it.

Good night darling and God bless you dear.

Thursday morning,
July 29/09

Good morning Darling Mammie,

Hope you have had a good night—I have had my dip. The air is cold, but the water was not quite so nipping as yesterday. I had a good few swimming strokes, but like Abraham I emigrated fairly quickly. I see Dr Salmon is elected Speaker. Well it was an exciting contest and the incident about Duffy voting was amusing. We have not finished our first case yet, and some of the episodes in that have been quite entertaining.

I am trying to get a *Courier* to send you in case you don't get one in Melbourne.

Now there's the gong sounding for Breakfast, and you know how I have to take every moment to gormandise and so I shall just say Ta ta Chummie Girl. God bless and keep you darling, and with kisses and hugs and love galore I am yours ever

Isaac.

These letters survive, and there were doubtless many, many more in like vein which have not been preserved. Although without his formal education and his breadth of reading, Rebecca Isaacs surely matched her son Isaac in intellect, and emotionally she dominated him. This made for uncomfortable relationships; it is said that Isaacs would at times leave his own family for periods of time, to live with his mother and her family at Auburn. The mother yielded little of her hold over her son long after he was the husband and the father of a family. Among his papers there is a long unfinished letter from his mother to him, dated 20 June 1900, at Auburn. In it she tells of a nurse, a Miss Watson, in his employ, and in the course of the letter makes very clear her views of the Jacobs family—Isaacs married Deborah Jacobs:

> She (Watson) was sitting one day under the verandah with the children and Mrs Jacobs and myself were there also on the 1st of March when that Watson said to the children Darlings your mother made a great mistake when she married at eighteen to such a man as your father she is far too lovely and too young for him . . . Of course Mrs Jacobs was delighted with her I don't know what it is but she holds the Jacobs crowd in the hollow of her hand.

The document goes on and on in this vein, becoming more violent and hysterical until it abruptly stops without signature. It was never destroyed and apparently never sent in this form, although it was among Isaacs' papers, and he presumably read it. Relations between

Isaacs' own family and his mother were not good; Rebecca Isaacs is remembered by her granddaughter as a rather formidable, meddlesome, interfering old woman. One does not need much knowledge of psychology to understand why. Earlier accounts have sentimentalized the relationship between Isaacs and his mother. For both of them it was profoundly important: Isaacs meant more to his mother than did her own husband, and his mother meant more to him than did his own wife and family. Though it is not easy to set down, one understands more of the complex character of Isaacs through having these fragments of writing to and by her. She died in Melbourne in 1912 and it was said that after her death, her room at Auburn was left undisturbed. If it is true, it is not surprising.

2

The Bar and Marriage

IN 1882, when he was almost twenty-seven, Isaacs commenced practice at the Victorian Bar. He remained in active practice until the last quarter of 1906, when he was appointed to the Bench of the High Court of Australia, and he argued his last reported case in the High Court less than a month before he became a judge. When Isaacs first came to the Bar, the High Court was not yet in existence and he found his practice in the Victorian courts and later, and on rare occasions, in the Privy Council. From 1892 until his appointment to the High Court Bench he was continuously involved in politics: from 1892 to 1901 in Victorian politics and for more than half that time in government office, principally as Attorney-General; and from 1901 to 1906 as a member of the Commonwealth House of Representatives, and for almost a year and a half as Attorney-General of the Commonwealth.

When Isaacs came to the Bar in 1882 Sir William Stawell was Chief Justice of Victoria and the Bench of the Supreme Court comprised five judges. Stawell was succeeded as Chief Justice in 1886 by George Higinbotham who had been a puisne judge of the court and before that a notable figure in Victorian politics. Higinbotham died in office at the end of 1892, and was succeeded by Sir John Madden who continued as Chief Justice of Victoria throughout the period during which Isaacs was in practice. The Supreme Court Bench for a time was increased to six, though apart from the appointment of Madden there were no changes in its composition from 1890 when Joseph Henry Hood was appointed until 1906 when Leo Cussen became a member of the court.

In company with other young barristers starting at the Bar, Isaacs was not much concerned in the early days of his practice with the exalted jurisdiction of the Supreme Court. Work came slowly, and he had no family advantages or professional connections to ease the path. But his skill as a lawyer, his determination, his capacity for work and his thoroughness in the preparation of his

cases and papers were early made manifest and enabled him to establish himself as a well-regarded junior at the Bar. The eighties were years of prosperity and brought him work, and when the economic collapse came in the following decade, he was well established. In 1890 he appeared in fifty-seven cases reported in the Victorian Law Reports, including nineteen appearances before the Full Supreme Court on appeals or orders to review. That was by no means the whole of his practice; there were other cases which were not reported, as well as a good deal of paper work, but it gives a very fair indication of his strength and standing at the Bar.

When he was making his way, the notable and leading figures at the Victorian Bar were men like Madden and J. L. Purves. Madden was not a deeply learned lawyer, though he became Chief Justice, while Purves' reputation rested upon his advocacy, which still remains part of the lore of the Victorian Bar. Isaacs also practised among contemporaries who were to make distinguished reputations. They included H. B. Higgins, who was his opponent in notable cases, his associate in political life, and was appointed with him to the High Court Bench in October 1906. Frank Gavan Duffy later became a High Court judge and succeeded Isaacs as Chief Justice in 1931. Leo Cussen's name is linked with Isaacs in cases in the Supreme and High Courts. Cussen became a Supreme Court judge in 1906, and is accounted by many as one of the most distinguished figures in Australian law. W. H. Irvine succeeded Isaacs for a short time as Attorney-General of Victoria in 1899, later became Attorney-General of the Commonwealth, and was Chief Justice of Victoria from 1918 to 1935.

From the mid eighties Isaacs' position at the Bar was secure. The Victorian Law Reports for the following decade, 1890 to 1900, which again tell only parts of the story, show that he made frequent appearances in substantial cases. From the earliest years of the decade he held briefs on behalf of large corporate clients, including banks, the Stock Exchange, land and finance companies, and local authorities. This support continued after he became a Queen's Counsel in 1899, as his retainer book for the years 1901-6 shows. That period of his professional life, which took him into the new jurisdiction of the High Court as well as into the Victorian courts, will be discussed in Chapter 5.

The range of his practice was very wide: a sampling of the reported cases during the nineties shows him appearing in various company law matters, in cases involving tort, contract, insurance,

insolvency, mining and trust law, and in a variety of local government matters. To these, in the last few years of his practice, he added federal constitutional matters and cases arising under federal law. The summaries of his arguments, as reported, reveal thorough and detailed preparation and analysis of his cases. He worked long and hard, he had a good voice and style, and his great powers of concentration and seemingly inexhaustible energy served him well.

Sir John Latham, who started at the Victorian Bar in 1905, wrote many years later that Isaacs was noted at the Bar for

> the close and detailed attention which he paid to his cases, the completeness of the arguments which he presented and his pertinacity in advocacy. He had a remarkable equipment of legal knowledge which brought him to the top of the legal profession.[1]

There were increasing demands on his time and energies as his public and parliamentary career progressed.

Isaacs attributed his powers of endurance partly to his physical fitness. While he was not an athlete and had little interest in organized games, he ran quite long distances and continued to do so up to middle life, and for long thereafter he was a very keen and assiduous walker. A physician, then a young doctor, who attended him at Macedon when he was in his mid eighties, recalls that Isaacs would speak with obvious satisfaction of his physical fitness which he attributed to his practice of taking regular exercise. He was abstemious; he did not smoke and drank very little alcohol. His only excess was tea drinking: those who recall his personal habits say that he was always good for a cup of tea, and indefatigable in seeking it out.

He does not appear to have taken an active part in the controversy over amalgamation, the fusion of the two callings of barrister and solicitor into a single profession. In 1891, the year before Isaacs entered the Legislative Assembly, the Victorian parliament passed the Legal Profession Practice Act which provided that from 1 January 1892 all persons admitted to legal practice should be admitted as barristers and solicitors, and that all persons previously admitted as barristers or solicitors might practise as both. Before this time, the two professions had been separate, and Isaacs had been admitted as a barrister. Amalgamation had been discussed in the eighties, and Isaacs' mother had made her sharp comments on that debate

[1] (1948) 22 Australian Law Journal, at p. 66. Latham was Attorney-General of the Commonwealth 1925-9 and 1931-4 and Chief Justice of the High Court 1935-52.

in a letter already quoted.[2] When the question of amalgamation came before the legislature in 1891, it provoked active discussion in the editorial and letter columns of the press, which continued for some months. Isaacs, who was then a leading junior at the Bar, appears to have taken no public part in this debate, and there is no clear evidence of his position on this controversial professional question. In the event, amalgamation did not produce a significant change in professional practice: the barristers reached agreement that they would refrain from practising as solicitors.[3] A Bar roll was established and the Bar retained its separate identity by requiring that persons on the roll should undertake to practise exclusively as barristers, and should only appear with persons on the roll. Isaacs was on the roll of counsel and practised exclusively as a barrister.

Then, as later, his interests ranged far beyond the law. He read widely in science, religion, and literature, and ornamented his speeches with quotations from prose writers and poets. Throughout his life, he was a student of foreign languages. Alfred Deakin, describing Isaacs in the latter nineties, wrote:

> He practised his French accent by following an itinerant Gallic knifegrinder from street to street, book in hand and engaging him in conversation. German he readily conquered and the classics offered no obstacle.[4]

Max Gordon says that Isaacs learned Russian very early from his parents, and that he gathered his early knowledge of other European languages, French, German, Italian and Greek, as well as a smattering of Chinese, from the miners of Yackandandah.[5] At a later stage of his life, he learned Russian conversation from the Taft brothers who were proprietors of a pen shop in Collins Street, Melbourne. At his family table, conversation was at times required in French and Italian; and he conversed in foreign tongues with many people. One lady remembers that when as a girl she went to Yarralumla, the vice-regal residence in Canberra, while Isaacs was Governor-General, he required her to converse with him in French. She retains a letter from him, delivered by an aide, accompanying

[2] see p. 7 above.

[3] See Heymanson and Gifford: The Victorian Solicitor (Law Book Company of Australia, 2nd edn 1963) at p. 3.

[4] The Federal Story, ed. J. A. La Nauze (Melbourne University Press 1963) at p. 69. For the full text of this quotation see p. 46 below.

[5] Gordon: Sir Isaac Isaacs (Heinemann 1963) at pp. 12, 17.

a magazine which he had promised to her after a conversation at a cocktail party given by the Prime Minister, Mr Lyons.

Government House,
Canberra
23/2/35

Chère Mademoiselle:

J'ai le plaisir de vous envoyer par l'intermédiaire du lieutenant Hunt le numéro du 'Petit Journal' que je vous ai promis à la soirée de M. et Madame Lyons.

J'espère que vous le trouverez interessant et en même temps utile. Comme vous le verrez par les renseignements à la première page c'est un journal paraissant à New York pour les étudiants en francais aux Etats-Unis.

Veuillez, Mademoiselle, recevoir pour vous et toute votre famille mes salutations cordiales et respectueuses.

Isaac A. Isaacs.

Isaacs was then in his eightieth year. Towards the end of the next year, 1936, returning by sea from England after he had retired from office, he related in a letter to his daughters how he was serving the captain's table as interpreter for a French governor. This time, there were jokes, and not very good jokes, in French.

I am afraid the Captain and the French Governor are getting suspicious of me whenever I start a story. There have been so many unexpected dénouements. The Frenchman let me down sadly the other day. We were discussing Japan and the possibilities of conquest —Manchuria and the Philippines and Australia—and I said to Marchesson, 'Mais, Monsieur, je vous assure que les intentions du Japan sont pacifiques'—(il dit oui?). Je continuait—Oui, vraiment pacifiques (il dit vraiment?). Je disait—'Oui absolument vraiment pacifique—c'est à dire l'Ocean Pacifique.' He put up his hands and said 'Oh!'

As it turned out it was good prediction and not altogether a joke.

He also carried on correspondence in Russian and German. The Melbourne portrait painter Percy White, who twice painted Isaacs and had a long-standing friendship with him, relates that he received letters from him in these two languages. There are also various stories of his conversations with Italian and Greek shop-keepers and there is quite a proud reference to these skills in a letter to his daughter, Marjorie, in November 1942:

. . . Our greengrocer lives near. I called there with Mother the other day and addressed him in Italian. He looked peeved and said 'I'm Grik.' So I addressed him in Greek and he beamed. We haven't spoken a word of English since. He gives us the best of everything.

In his years at the Bar Isaacs was also an active Freemason, and when in 1889 the English, Irish, Scotch and Grand Lodge of Victoria combined to form the United Grand Lodge of Ancient, Free and Accepted Masons of Victoria, Isaacs was appointed to the high masonic office of Grand Registrar. He was the first Grand Registrar of the United Lodge and held office for the year 1889-90.

In his early years at the Bar he was to some extent concerned in the affairs of the Melbourne Jewish community. In 1882 he was honorary secretary of the Melbourne Jewish Young Men's Russian Relief Fund which worked 'to raise funds for the relief of the distressed Jews in Russia', as its purposes were defined in a circular letter despatched under Isaacs' signature. A minute and letter book covering the affairs of this fund in May 1882 is preserved with entries in Isaacs' handwriting. At this time he also appears to have had some interest in Jewish education and in the mid nineties, as Attorney-General, he presided at a meeting in Melbourne at which the United Jewish Education Board was founded, and he was elected as its president, though he withdrew soon after, giving as his reason the pressure of work as Attorney-General.[6] Though his letters often dealt with Jewish matters, Isaacs' connections with Jewish religious and community life became quite tenuous, and in this respect there is a striking contrast between him and his younger contemporary, General Sir John Monash, who was actively involved in Jewish religious and communal life in Melbourne. It was only in the last years of his life, over the issue of Zionism and Palestine, that he became deeply involved as a partisan in a Jewish community issue. That story will be told later.[7]

In 1888 Isaacs married Deborah—Daisy as she was known—Jacobs, one of two daughters of Isaac Jacobs. Isaac Jacobs was born in Prussia and came to England with his parents at an early age, and as a very young man took employment with a firm of jewellers in Manchester. About 1852 he was sent out to Melbourne to establish a branch of the firm. At the age of twenty-six he married, in

[6] See Goldman: The Jews in Victoria in the Nineteenth Century, at p. 124.
[7] see p. 225 below.

Melbourne. He subsequently entered into partnership as a wholesale tobacco and cigar merchant, and, at the time when Isaacs married his daughter, was a substantial and respected figure in the general and Jewish communities of Melbourne and was president of the Chamber of Manufactures in 1889-90. Earlier, in the 1870s, he had been a foundation member and twice president of the St Kilda Hebrew Congregation. A memoir privately prepared for the Jacobs family by his son, P. A. Jacobs, speaks of him as a public-spirited and charitable man. He suffered severely in the economic crash of the nineties, and in his later years was not in comfortable financial circumstances.

Isaacs' marriage to Daisy Jacobs took place on 18 July 1888.[8] He was almost thirty-three and she was eighteen. She had been privately educated, and had some knowledge of foreign languages. She had grown up in a large family, mainly of boys, and there was a lively family affection between them. Her marriage to Isaacs did not however make for good relationships between the Isaacs family and the Jacobs family. The unsent letter from Isaacs' mother to him which has already been quoted[9] made clear her views about her son's parents-in-law and we know how powerful her influence was on him.

Relations between Isaacs and his brother-in-law P. A. (Phil) Jacobs were never good. Isaacs moved Phil Jacobs' admission to the Bar in 1895, but Jacobs did not read with him, and there was always a coolness between them. Phil Jacobs, who was born in 1873, was a notable figure in his own right: an author of legal texts and of legal reminiscences who was held in affectionate regard at the Victorian Bar. He lived into his nineties, and in his old age spoke critically of Isaacs' character and his ambition and egotism. At the same time he cherished a lively affection for his sister Daisy, but the inevitable consequence of the coolness between the men was that the families remained at a distance, and the next generation, the children of P. A. Jacobs, saw and knew little of their uncle. What produced the unhappy relationship

[8] Isaacs wrote to his daughter Marjorie on 17 July 1941, fifty-three years later: 'Thanks dear for the lovely slippers you have sent me as a birthday present. I fancy you have got two very important dates mixed which is not to be wondered at seeing the number of similar occasions that come within your range of family events. The 18th July, that is, tomorrow will be the Anniversary of the day Mother and I were made partners for life, and of course I cannot imagine anything "slippery" about that. The day I "slipped" into the world was August 6th.'

[9] see p. 13 above.

between Isaacs and his brother-in-law, men with common professional interests, is not known. In the family memoir, P. A. Jacobs contents himself with the terse statement that Daisy was married to Mr Isaacs who in course of time as Sir Isaac Isaacs became Governor-General of Australia.

Daisy Isaacs survived her husband by more than twelve years and died at Bowral, New South Wales, in June 1960. Little is known of the early years of the marriage. One surviving letter from young Daisy to her husband, written in 1892, gives news of the children and sends filial greetings to her formidable mother-in-law. There were two children of the marriage: Marjorie, who was born in December 1890, and Nancy, born in January 1892. In the earlier years of the marriage, there were complications which arose from Isaacs' extraordinarily close attachment to his mother, and it appears that he would go from time to time to live at Auburn with his mother and brother and sister. As she matured, Daisy Isaacs became a considerable person in her own right.[10] Though impressions of her vary, it appears that she was a woman of dignified appearance, strong personality and considerable style, who enjoyed her public position. Isaacs left very much to her the management of their domestic affairs, and their daughter, Marjorie, who married the late David Cohen in 1910, recalls that her parents were always shifting house, that the furniture removers were ever at the door, as her mother found another and for the time being seemingly more appropriate abode for them. The one permanent abode was the country house, Marnanie, at Macedon, which they retained until the 1940s, and in which they spent summers and such other times as they could give to it.

For a period during the 1920s they made their principal home in Sydney. Daisy Isaacs had her own circle of friends and she was a keen bridge player—Isaacs in his family letters makes frequent references to 'mother's bridge'—and a tennis player, and she continued these activities in their days at Government House in Canberra. She travelled frequently; sometimes with her husband,

[10] The Bulletin for 18 October 1906, in its Melbourne Chatter column carried a robustly written reference to her: 'Mrs Isaacs is gathering in a shoal of congratulations on her husband's elevation to the bench. This stately dame is of the type that can accurately appraise the felicitations. She has wit and discernment and can separate the chaff from the grain better than most other fashionables. From the political clique Mrs Isaacs will be missed. She was a watchful Galleryite, though her indolent posing and sidelong glance rarely gave a clue to the sharp intelligence that whetted its edge. As a judge's wife, Mrs Isaacs will have less exercise for her tact and diplomacy.'

sometimes without him. As the wife of the Governor-General, she was called upon to participate actively in public life, serving as patroness to many bodies, making speeches, attending ceremonial occasions and acting as hostess, and she did all this very well. Isaacs' letters to his daughters during this period report on her activities and he gives her high praise for what was obviously good performance. In May 1934, he wrote to Marjorie from Canberra: 'I enclose two of Mother's functions. . . . She did well there—she always does—but *specially* well there.' In October 1934, in another letter to Marjorie, he refers to the assassination in France of King Alexander of Yugoslavia and M. Barthou, the French minister:

> One result is that as 12 days Court Mourning is ordered, we can't go to the Pioneers' Ball in Melbourne on the 17th. Mother and I are simply disconsolate, especially I—because I hear there are to be some wonderful debs . . . Mother is naturally more grieved about it than I could possibly be. She is afraid it will affect her 'dress' for the occasions.

During her days in Canberra she began a correspondence with Queen Mary, which was to be followed by personal meetings, and for years thereafter she took great pride and pleasure in her correspondence with the Queen Mother. Isaacs himself took great pleasure in his royal associations. Despite the unhappy history of King George V's strong opposition to his appointment as Governor-General,[11] Isaacs worked hard to establish good relations. In September 1934, in a letter to Marjorie who was then abroad with her husband and had been received in London by the King and Queen, he wrote of the King: 'I have constant evidence of the King's graciousness to me. I try my best for him but my best is hardly good enough for what he deserves.' And from Marnanie in January 1939:

> The King and Queen sent a charming letter to us both; and the Duke of Gloucester a beautiful card signed personally. The card from the Kents is a lovely photo of the Duke and Duchess and their little daughter, and is signed 'George', 'Marina'. Queen Mary's was delightful. A card with a message and 'Mary R.' We have had many nice ones but of course these are the Crème de la Crème.

As Isaacs and his wife grew older, they drew closer to one another, and in their later days there was a strong mutual dependence and

[11] see p. 193 below.

affection. His letters to his family make frequent reference to her and reveal affectionate concern over her illnesses, and a warm and sometimes a wry understanding of her interests and her hobbies. The marriage was in its sixtieth year when Isaacs died in February 1948.

3

Victorian Politics: 1892-1901

AT THE VICTORIAN GENERAL ELECTION of April 1892, Isaacs was elected to the Legislative Assembly as a member for Bogong. The district included Yackandandah and Beechworth, where he had spent the years of his childhood and adolescence. He was thirty-six at the date of his election; he had already been at the Bar for a decade, and he was professionally well established. The *Ovens and Murray Advertiser* of Beechworth, in a lengthy article on the member for Bogong published more than two years later, recorded that Isaacs had consented to offer himself for election with some reluctance.

> It was whilst on a visit to Beechworth a short time before the general election of 1892 that a number of the electors suggested to Mr Isaacs that he should render his services available as the parliamentary representative of the district in which his early years were passed. At that time such a contingency had never presented itself to his mind. He had, indeed, given no thought to the adoption of a parliamentary career, though he had always been a close and attentive observer of the current of political life. He told his interviewers this, but he accompanied his statement with the assurance that, if he ever did sit in parliament, there was no constituency which he would sooner represent than Bogong. The time was not long in coming when it became necessary that he should make up his mind with respect to the request that had been made. The dissolution came; the request was repeated. Gentlemen from Bogong interviewed him in Melbourne, and pressed him to give an acquiescent reply, and at length he decided to assent to the request.[1]

That was the story as told in a very sympathetic and laudatory article in a newspaper in the heart of the Bogong electorate, and it gives what is likely to be a substantially correct account. Isaacs was first and foremost concerned with his professional career, and by

[1] 22 September 1894.

1892 that was, even at that difficult time, securely established. A political career in no wise threatened his professional advancement. Throughout his political career both in State and federal politics, he carried on an active and extensive practice at the Bar. Sometimes his private professional activities became a matter of public controversy. During the Mercantile Bank dispute in 1893, Isaacs' critics charged that he neglected his portfolio as Solicitor-General for his private practice. That is not likely to be true, for his enormous energies gave him the capacity to handle both tasks at a time when the demands of political life were less pressing than in a later generation. Towards the end of the decade, when he was Attorney-General in the Turner government, there was debate, inside and outside the Assembly, over Isaacs' acceptance of a brief to argue a Privy Council appeal on behalf of the Melbourne Tramways Company in a case involving the rateability of its properties by the Fitzroy municipality. It was said in the Assembly that Isaacs' previous professional commitments should have debarred him from taking this brief and that as Attorney-General he should not accept such a brief for private against local governmental interests. In a modern context there is force in this argument, although in Victoria the practice survives, even at the present day, of ministers of the Crown carrying on private professional practice and of retaining directorships of public companies. Isaacs was supported by the Premier and vigorously defended himself in the House. He went to England to conduct the case and was there for an extended period during 1900.

In 1892, when Isaacs entered the parliament, the colony was floundering in the depths of the depression of that difficult decade. There was severe unemployment, investment had sharply declined, and the budgetary problems of government were acute. The eighties had been a time of prosperity and boom. There had been very heavy overseas investment, a great expenditure on railways and a remarkable expansion in manufactures. There was much speculation in urban land and a vast increase in residential construction. Much of this had a very unsound credit base in which the whole banking system became involved. Beneath the façade of prosperity,[2] there

[2] La Nauze: Alfred Deakin: A Biography (Melbourne University Press 1965) Vol. 1 at p. 121 writes: 'Towards the end of the decade, they [the Australian colonies] were in the midst of an economic boom which reached its most extravagant heights in Victoria. The government, the municipalities, private institutions and individuals, were engaged in large programmes of construction of railways, public works, shops, offices and houses on such a scale that the physical evidence of a boom during one of

was evidence of economic weakness, the price of wool was declining, and there were other worrying signs. The boom and bust story is well told by an Australian historian:

> . . . Melbourne speculators were the most exuberant. In the late eighties, Victoria escaped for a time the worst of the drought. Over £50,000,000 was borrowed by the public and private creditors between 1885 and 1890. Railway construction gave plenty of employment; the 70,000 immigrants in these years raised the population to over a million. The housing boom stimulated speculation not only in country but also in suburban lands. Building societies purchased and subdivided suburban estates, they accepted payment on easy terms, and gave extensive credit even after the banks had begun to show signs of caution. City blocks changed hands for over £200 a foot; it was almost impossible to buy without being offered an advance on the purchase money next day. The hysteria was increased by so much speculation in the new Broken Hill and Mount Morgan mining shares on the Stock Exchange that the volume of business reached £6,000,000 a week in 1888, though there was no comparable increase in production to justify these extraordinary inflated values. . . . Forty-one land and finance companies in Melbourne and Sydney with liabilities of £25,000,000 failed in 1891 and 1892. Only four small banks collapsed in this period, yet it was obvious that many advances on city land were lost, that overdrafts to depressed primary producers were temporarily 'frozen hard' and that loans for urban housebuilding would not be repaid while the borrowers remained unemployed. . . . In January 1893 the important Federal Bank suspended payment; in April the 'pioneer in the land-mortgage business', the Commercial Bank of Australia, did the same. Panic followed. Within a month, there were eleven more suspensions.[3]

Isaacs opened his campaign at Chiltern, where he was little known. In a day when party lines were not very clearly defined, his policy speech concentrated on depression themes. He called for retrenchment which should be spread equitably, for railway reform, for direct income taxation rather than indirect taxes which unfairly hit the poor. He spoke in support of conciliation machinery to resolve labour disputes, he made approving reference to Australian

the world's sad periods of architectural taste was strikingly evident to a newcomer to Victoria in the middle of the next century. Much of the construction was concentrated in the capital. The population of "marvellous Melbourne" rose rapidly from 283,000 in 1881 to 491,000 in 1891. From the upper floors of the tall, ornate office blocks in its central streets which the introduction of the hydraulic lift made practicable, a spectator would see no end to sprawling suburbs.'

[3] A. G. L. Shaw: The Story of Australia (Faber 1962) at pp. 170, 176-7.

federation, and generally called for steps to assure the restoration of prosperity and confidence.

It appears that this speech made a strong and favourable impression which was confirmed by his subsequent platform appearances. He was returned with a comfortable majority; he received 609 votes, against 474 and 357 respectively for his two opponents.

The new government, led by William Shiels, was beset with the problems of restoring the colony's overseas credit and alleviating economic distress. Isaacs attracted attention when he made his maiden speech in moving the address-in-reply. He generally supported the government's policies, and specifically called for an income tax which he described as a 'direct, proportionate, just and productive means of taxation'.[4] He strongly supported company law reform to deal with misleading and deceptive prospectuses and to impose stricter controls over the activities of directors and officers of companies. Company law reform was a major concern of Isaacs when he later became Attorney-General. This speech was applauded in the press; it was compared more than favourably with Alfred Deakin's contribution to the debate, and the *Bulletin* described it as 'the best effort of the kind within recollection'. A contemporary sketch shows a frock-coated, well-fleshed and moustached Isaacs in oratorical pose, delivering this speech. Some days in advance of his speech *Table Talk* wrote a very sympathetic article about him; it foretold great prospects for the new member.

> It can be safely predicted that at no distant date, he will be included in the ministry—probably as Law Officer of the Crown, and no one who knows him will deem it extravagant to say that he will one day wear the scarlet and ermine of the Supreme Court, although this cannot happen until some distant time.[5]

The first part of this prediction was very rapidly confirmed and the second part more than fulfilled by his appointment some fourteen years later to the High Court of Australia.

Though a Labour party was emerging in the nineties and the Progressive Political Labour League won ten seats in Victoria in 1892,[6] Victorian politics were still very fluid, and party divisions

[4] V.P.D. (Victorian Parliamentary Debates) Vol. 69, at p. 16.

[5] 19 April 1892.

[6] Manning Clark: A Short History of Australia (Mentor Books 1963) at p. 163, says of their original aims: 'in politics Labour was concerned to give everyone a voice in deciding the conditions under which he lived. In their party they

were not clearly defined in the Assembly. Isaacs' support of the Shiels government, which he announced in his maiden speech, was personal, and some months later he withdrew it. Over these months Isaacs made various contributions to the Assembly debates; he supported proposed amendments of the libel law to bring Victorian law into line with recent English legislation which gave protection to the press in making fair and accurate reports of public meetings. The speech was characteristic both in the thoroughness with which it dealt with the legal background and in its peroration in which Isaacs declared that:

> the press were the beacons of a country; seeking light and information to throw around all; and, like the general sunshine, to destroy the germs of corruption wherever that light fell.[7]

The printed word does not disclose whether this high-flown prose was received with some merriment; we live in an age of less hyperbolic utterance.

The ministry was not well led and it found the difficult problems with which it was confronted unmanageable. It did not impose an income tax, and preferred to increase other taxes; it also proposed additions to the tariff. It made no progress with company law reform. In January 1893 Isaacs crossed the floor and helped to vote the ministry out of office. He said that it had failed to honour its election pledges, that the state of the public finances had deteriorated badly, and that the government had failed to give a lead to the country in times of great difficulty.

On the fall of the Shiels government, J. B. Patterson was commissioned to form a ministry. Patterson had migrated to Australia from England in 1852; he had entered parliament in 1868 and had been a member of four ministries. His political disposition had grown increasingly conservative over the years. Isaacs, who had been in the Assembly for less than a year, was offered and accepted the portfolio of Solicitor-General. In accordance with the requirements of the constitution as it then stood, he had to stand for re-election, and he was returned unopposed. The senior law officer, the Attorney-General, was Sir Bryan O'Loghlen, an Irish baronet, who had been Premier in 1881-2.

talked much of this political democracy—about the abolition of plural voting, the abolition of the legislative council, the election of ministers, the right of recall, the distribution of electorates to provide one man, one vote.'

[7] Table Talk, 30 September 1892.

The appointment of Isaacs as Solicitor-General was well received. Patterson in introducing his new ministers spoke of Isaacs as

> a brilliant and talented Australian native. Born and educated in Victoria, he has won his way by sheer force of his great ability to the front rank in the legal profession and now at great personal sacrifice he accepted office.[8]

The press was generally favourable; it was said that Isaacs brought to the government a powerful mind, great legal skill and considerable ability in parliamentary debate. One of the Solicitor-General's early official duties was to welcome the new Chief Justice of the Supreme Court, John Madden, who had succeeded George Higinbotham, who died in 1892.

Isaacs' first tenure of public office was of short duration, for on 24 May 1893 Patterson demanded and received his resignation. The quarrel occurred over the Mercantile Bank case. The Mercantile Bank had been an apparently stable and prosperous financial institution which failed in 1892. Its chairman was a well-known citizen, Sir Matthew Davies, who had been a member of the Assembly for ten years and Speaker from 1887 until his retirement from politics in 1892. There was a run on the bank in 1892; it failed to meet its obligations and its compulsory winding up was ordered by an English court in the middle of that year. The events were widely discussed in the press, where it was said that there were matters connected with the management of the bank before it suspended payment which, on investigation, would probably lead to criminal proceedings, and Sir Matthew Davies' own dealings were specifically and unfavourably reviewed.[9] These events and the career of Sir Matthew Davies (and other land boomers) have recently been recounted by Michael Cannon in *The Land Boomers*.[9a]

Shortly before the fall of the Shiels ministry, summonses were issued against Davies, Millidge (the manager of the bank), and two of the bank's auditors, charging conspiracy. At the time, Davies and Millidge were out of Australia, and the preliminary proceedings did not take place until May 1893. In March and April 1893 public confidence in the banking and financial houses had been further damaged by a fresh crop of failures. After somewhat turbulent proceedings in the magistrate's court, Davies and Millidge were committed for trial in the Supreme Court on charges of

[8] Age, 31 January 1893.

[9] Table Talk, 1 July 1892.

[9a] (Melbourne University Press 1966).

conspiracy to defraud. Shortly thereafter, in mid May, it was announced on behalf of the Attorney-General that the indictments would not be proceeded with, and a senior Crown prosecutor appeared in the Supreme Court to announce to Mr Justice a'Beckett that there would be no prosecution. Thereupon Isaacs announced that in the exercise of the independent authority vested in him as Solicitor-General, he proposed to consider the question of instituting proceedings against Davies and Millidge. He based his power to do so on the terms of section 338 of the Crimes Act 1890 which provided:

> Subject to the provisions hereinbefore contained, it shall be lawful for Her Majesty's Attorney-General or Solicitor-General for Victoria or for any prosecutor for the Queen in the name of a law officer to make presentment at the Supreme Court or General Sessions of the Peace of any person for any indictable offence cognisable by such courts respectively, and every such presentment may be in the form contained in the fourth schedule to this act or to that effect, and shall be as good and of the same force, strength, and effect in law as if the same had been presented and found by the oaths of twelve good men and true.

Isaacs read the section as conferring authority on him to act independently of his fellow law officer, the Attorney-General, and as authorizing action by him in a particular case, notwithstanding the contrary view of the Attorney.

In a letter of 20 May, the Attorney remonstrated with Isaacs. He observed that he had first heard of Isaacs' proposed action through the press and not through personal communication. The letter proceeded:

> But since you have done so, it now becomes my duty acting as Her Majesty's Attorney-General, to officially request you to abstain from taking the course you propose of practically reconsidering as a grand jury my decision in the same character and also from taking further official action in regard to that case. Every member of the Cabinet is entitled to his own opinion as to that decision. . . . But once I have decided and taken action as Attorney-General acting as a grand jury, no one has any right to interfere with, or review officially, that decision or to nullify action taken by me on behalf of the Crown. You must consider the constitutional position and what differences of judgment may lead to. The Queen cannot speak with two varying voices through two responsible ministers on one and the same occasion, the one perhaps saying 'no prosecution' and the other saying

> 'I must make a presentment'. You must remember too, in interpreting the section you refer to in the paper, that that section has to be read with the knowledge of Parliament of the constitutional position of Her Majesty's Attorney-General from the conception of that office. The Attorney-General is the chief law officer of the Queen, and the Solicitor-General comes after him. Only in the absence of or at the request of the Attorney-General does the Solicitor-General act as a grand jury in this colony. No Solicitor-General has ever acted independently as a court of review in any case decided by his senior law officer, the Attorney-General. It would be manifestly most unconstitutional for him to do so, as well as against all precedent.
> . . . For all these reasons, I, as Attorney-General, cannot sanction your proposed action, nor can I submit to it, nor can I ignore it. I must therefore officially request of you with the utmost urgency to abstain from carrying out your intentions as announced in the papers.

In his reply Isaacs said that he conceived it to be his 'bounden duty' when publicly asked about his intentions 'that I should not conceal them for an instant, the more especially as, judging by your own published expressions, any communication with you would have been futile'. It is a view of bounden duty which many in public life might dispute. Turning to the law, he asserted that, as a matter of interpretation of the plain words of the section, an independent discretion was reposed in each law officer.

> I take my stand on the plain interpretation of the act, and, standing there in the presence of a great national exigency, I am resolved that so manifest a wrong to the people of Victoria and the cause of justice as is now imminent shall not exist if in my humble power to avert it. If precedent will not help me, reason and right shall; if overborne by any means, I will refuse to hold an office the proudest privilege and most precious jewel of which—the maintenance of even-handed justice to all, rich and poor, titled and obscure—will have been reft from me.

There followed more correspondence between the two law officers which understandably became more acrimonious as Sir Bryan was provoked by the implications of Isaacs' high-flown sentiments. It can scarcely be doubted that the Attorney-General had made a thoroughly bad and unwise decision, and his announced reasons for not proceeding with the prosecution were very easily torn to pieces by the press. The Crown prosecutors were interviewed and said that in their view a *prima facie* case had been made out against Davies and Millidge. The press discussed the matter at great length;

it was plainly the *cause célèbre* of the day, and legal opinions were canvassed and published. The *Argus* appropriately observed that it was 'an extra-ordinary incident in an extra-ordinary case' and convincingly exposed the weakness of the Attorney's reasoning in relation to the decision not to proceed with the prosecution.[10]

For Patterson and the government the matter was an appalling embarrassment. Patterson's first reaction was to say that the question of placing Davies and Millidge on trial was not a cabinet matter, but a decision for the Attorney as such, and that it was for him alone to decide whether the prosecution should go on, or be ended by entering a *nolle prosequi*. Yet it became clear that a first-class political row was brewing both because of the dispute between the two law officers and because of the explosive political aspect of the case. Reporters hung upon the words of the Solicitor-General who was not unwilling to provide them with copy; it was noted that he had been deprived by order of the Attorney-General of the services of the Crown Solicitor in preparing the papers for the proceedings against Davies and Millidge and that he was now, as Solicitor-General, personally undertaking the conduct of the prosecution with such assistance as sympathetic individuals might furnish. On 24 May Patterson sent Isaacs a letter of dismissal, which was apparently communicated to the press before it reached its recipient.

> After the consideration which the Cabinet gave to the question of your claim to make the prosecution in the case of the Mercantile Bank a Cabinet matter, I am quite confirmed in the view which I have always held, and which the Cabinet has affirmed, that the proprieties of the administration of justice demand that the function of filing or not filing a presentment should be discharged by the Attorney-General, and in his absence by the Solicitor-General, and entirely apart from the political Cabinet, and altogether distinct from any personal view any member of the Cabinet may entertain.
>
> You are, of course, aware that out of consideration to you the following resolution was adopted at the meeting of the Cabinet on Monday last:
>
> > 'That, in the opinion of this Cabinet, it is unconstitutional for it, or any member of it, to interfere with the Attorney-General in the discharge of his functions as a grand jury either directly or indirectly.'
>
> In that resolution you concurred, and it was unanimously adopted by the Cabinet. The Cabinet affirming this view as its deliberate and

[10] 28 May 1893.

well-considered opinion, I was greatly pained to observe by the press this morning that you have expressed a determination to improperly involve the Cabinet in your action. Whatever may be the motives impelling you in your proposed course its effect is plainly to expose the Government to ridicule.

In view of your entirely disloyal attitude to your colleagues who have shown you so much consideration, I have now again to request that you will at once forward to me your resignation of the office you now hold in this Government.[11]

Isaacs immediately tendered his resignation. In a lengthy reply he pointed out that the implication in the Premier's letter that he had previously been asked to resign was unwarranted, he disputed other matters of fact and restated his case, and rejected the charge of disloyalty as 'preposterous'.

In resigning his office, Isaacs also decided to put himself upon the country by resigning and recontesting his seat. He had a very satisfying press all over Victoria and outside it. The metropolitan and the country newspapers spoke in high praise of his action, and at Beechworth he was tendered a banquet at which he was received with great applause when he narrated the story and wound up with a brilliant quotation from the Duke in *Measure for Measure*:

> My business in this State made me a looker on.
> Here in Vienna, where I have seen corruption boil and bubble
> Till it o'errun the stew;
> Laws for all faults,
> But faults so countenanced that the strong statutes
> Stand like the forfeits in a barber's shop—
> As much in mock as mark.[12]

Shakespeare on this as on other occasions served Isaacs well; he was never a man for understating or underdecorating a case. The Beechworth press duly noted that:

> Mr Isaacs will return to Melbourne after his reception at Beechworth, Wodonga and Chiltern, certain that he stands even higher in the estimate of his constituents than he did before and content in this knowledge to await the further development of events in parliament.[13]

Isaacs was returned unopposed as member for Bogong early in June, and he took part in the debate on the government's policy

11 Ovens and Murray Advertiser, 22 September 1894.

12 Ovens Register, 10 June 1893.

13 Ovens and Murray Advertiser, 10 June 1893.

which commenced in the Assembly at the end of that month. He spoke on 2 July and dealt at length with the history of the dispute and sharply criticized the government for refusing to prosecute the bank's officers and for its failure to introduce legislation to control company promoters. There were some unhappy personal interjections during the debate, and Isaacs angrily answered charges that he had been dilatory as Solicitor-General in the despatch of government business.

The later history of the Mercantile Bank prosecutions may be briefly recounted. Without Crown opposition, the Supreme Court granted an application for a grand jury to investigate the Mercantile Bank issues and a warrant was issued for the arrest of Sir Matthew Davies. He had left Melbourne for Colombo some time before, and his ship was unsuccessfully pursued by a police launch out of Adelaide harbour. When the ship reached Colombo on 16 June Davies was detained. A grand jury on 26 June returned a true bill against Davies and Millidge on charges of conspiracy to defraud. On Davies' return to Melbourne on 11 July, he and Millidge stood trial before the Chief Justice, Sir John Madden. Davies through counsel successfully moved for the quashing of the indictment on technical grounds. In August summonses were issued against the two men and they, together with Muntz, an auditor, stood trial on charges of issuing a false report and balance sheet. They were acquitted after a thirteen-day hearing.

Isaacs was hailed as a popular hero for his part in the Mercantile Bank case. At a time when public confidence was shattered by the collapse of the boom and the succession of bank failures, there was an understandable and justifiable demand for an account. Isaacs appeared to enter the lists on behalf of a defrauded public not only against corrupt financiers, but also against a government which was inept, which mouthed platitudes about cabinet responsibility, and which refused to face the fact that many ordinary people had suffered grievously at the hands of greedy and uncontrolled financial sharks. Certainly Sir Bryan O'Loghlen's stated reasons for declining to proceed with the Mercantile Bank prosecutions were poor and inept, and the press demonstrated in leading articles that they gave no answer to the charges. But more careful reflection suggests the unwisdom and one may even say the impropriety of Isaacs' action. Surely the appropriate course for him to have pursued in face of the Attorney's action and the government's support of that action was to resign his portfolio, and then

to attack the government as a private member. There is considerable force in O'Loghlen's argument that the section under which Isaacs claimed to act must be read in the light of cabinet responsibility. In face of the conflict between the Attorney-General and the Solicitor-General, the government was in an impossible position, and it is not difficult to understand Patterson's irritation with Isaacs' *communiqués* and with his high moral stance as a tribune of the people. The iniquities of the collapsed banks and finance companies may have been real enough, and the company law was woefully inadequate then (and not too adequate at a later time) to deal with those who fraudulently or recklessly solicited public moneys. Isaacs meshed all the issues together: the law as it stood, the law as it should be, the duty to bring rogues to account, and it is little wonder that he won widespread public acclaim. But at this vantage point, it is hard to justify the course he took.

The Mercantile Bank case was an important event in Isaacs' career. He had made a brilliant start in politics and his talents and great energy had been widely acknowledged. Certainly he was not assisted by family or other connections. In the Mercantile Bank case he challenged persons of standing and institutions of power and authority in the community and it was inevitable that he should henceforth be distrusted in these quarters. More than that, his conduct as a member of the government gave rise to the feeling that he was not to be trusted as a colleague; his motives and actions were suspect. Throughout his public career suspicion and distrust clung to him. It can be seen in contemporary reports of the proceedings of the Federal Convention of 1897-8 by such men as Deakin, and in the history of the events which immediately followed it. It can also be seen in the private correspondence between Sir Edmund Barton and Sir Samuel Griffith, his colleagues on the High Court. They disliked and distrusted him; their letters refer more than once in harsh terms to Isaacs' motives and to his caballings. This dislike and distrust were echoed in the statements and opinions of men of a later generation. Isaacs attained great position and eminence through his massive abilities, but he did so without attracting the personal affection and liking of many of his eminent contemporaries.

As already noted, the press was overwhelmingly favourable to Isaacs and hostile to the government's role in the Mercantile Bank case. The *Bulletin* noted that O'Loghlen had written to Isaacs saying, 'I am ready to justify my exercise of the royal prerogative

before the High Court of Parliament.' 'It would be possible,' said that robust journal, 'to justify worse things than that before the Victorian Legislature, which is only a *High* Court insofar as it smells a good deal.' Isaacs was also likened 'in theatrical effect and decisiveness' to Disraeli and was dubbed 'the Australian Beaconsfield'.[14] One of the most notable contributions to the press history of the case was a fine piece of writing in Gilbert and Sullivan style. It adds little to the history, but it is worth preserving and recording.

They've discharged Sir Matthew Davies, and acquitted Mr Millidge;
They have found them both not guilty of a criminal intent—
Ruled that neither was concerned in a conspiracy to pillage—
That the Mercantile suspension was a simple accident,
And this sudden termination
Of a serious accusation
Has resulted from the action—should you ask the reason why—
Of a *nolle prosequi*.

And the Finlaysons and Walshes,[15] with their *prima facie* cases,
Have been left to take their chances in a very awkward fix—
When Sir Bryan once gets started on the track he fairly races—
They took sixty days to finish but he did the job in six;
And with striking expedition
He arrived at his decision,
And he emphasised the 'wherefore' and interpreted the 'why'
With his *nolle prosequi*.

Let us not despise the *nolle*; let us hesitate to brand it
As a piece of stupid folly or miscalculated fun;
It is really interesting when you come to understand it,
It is simple and convincing when you know how it is done—
'Tis no conjuring illusion
Based on natural confusion
Of the quickness of the fingers and deception of the eye—
Presto! nolle prosequi!

Let us rather view the *nolle* as a fine old legal fiction
As a paradox most useful—though it seems a little odd—
To express a mind convinced against all possible convictions,
'Tis an *erat demonstrandum* when denuded of its '*quod*'

[14] Bulletin, 3 June 1893.

[15] Crown prosecutors.

'Tis an easy exposition
Of a Euclid proposition,
When the Q.E.D. is missing, the alternative reply
Is a *nolle prosequi*.[16]

For the duration of this parliament, which came to an end in August 1894, Isaacs played the role of an active private member. In September 1894 the Beechworth press praised its member's conduct during this time.

> In his attitude towards the ministry he has adopted a dignified course, which has not always been followed under circumstances of a somewhat similar nature . . . he has supported the ministry whenever it has been apparent that support was desirable in the interests of the public.[17]

It was at this time that a story often told about Isaacs, and attributed to various periods of his public life, became current. The *Melbourne Herald* on 27 February 1894 recounted the story of Isaacs' 'stubborn fight on behalf of a coatless democracy against the swells who rule the Public Library'. Throughout his life, Isaacs was a frequent visitor to the library. Overheated, he removed his coat on a hot February day as he climbed and descended the ladders in quest of learning. This apparently led the library authorities to invoke the rule that a visitor behaving in an unbecoming manner or being 'unfit' to remain in the institution should be excluded therefrom, and the distinguished barrister, member of parliament and former minister, was called upon to cover up. The story has been told of Isaacs at later and even more illustrious periods of his life and it is told here to fix its true place in history.

The Patterson ministry found itself no more capable of tackling the problems of depression government than its predecessor. It changed course on tax policy, it found itself able to do little in face of banking crises, and it could not stabilize the public financial position. Mr George Turner, the member for St Kilda, moved a vote of no confidence in August 1894 and the government fell after nineteen uncomfortable months of office. Isaacs spoke effectively in support of the no confidence motion. He made brief reference to the Mercantile Bank events, to the increasing deficit in government finances, to misplaced retrenchment policies which unduly

[16] Argus, 20 May 1893.

[17] Ovens and Murray Advertiser, 22 September 1894.

victimized the public service, to capricious and uncertain tax policies which served only to damage the standing and credit of the colony. The speech was replete with quotations from many sources and once again Shakespeare, this time *Macbeth,* served admirably:

> And be these juggling friends no more believ'd
> That palter with us in a double sense,
> That keep the word of promise to our ear
> And break it to our hope![18]

Throughout his life, Isaacs had a genius for apposite invocation of the Bard. Towards the end of his career on the High Court Bench, in the case of *Wright v. Cedzich*,[19] he dissented from the majority holding which in his view assigned to the wife a subordinate position in the matrimonial relationship. Isaacs, commendably, found the majority proposition outrageous. That, he said, was admirably stated by Petruchio in *The Taming of the Shrew*:

> I will be master of what is mine own:
> She is my goods, my chattels; she is my house,
> My household stuff, my field, my barn,
> My house, my ox, my ass, my any thing;
> And here she stands, touch her whoever dare;
> I'll bring mine action on the proudest he
> That stops my way in Padua.

But to return. Isaacs' speech was replete with literary reference; it was telling and obviously appreciated. The press particularly appreciated a comparison of the Patterson government with the barnacles.

> It is a fact in natural history that when barnacles fix themselves to the side of a ship they do so with an intention of remaining there for the rest of their lives, and having then very little further use of their organs of vision they lose their eyesight and develop an abnormal energy of stomach.

That is worth preserving in the armoury of contemporary politicians. As Isaacs resumed his seat, a parliamentary colleague was heard to say 'By gosh, old man, you are developing!'[20] A contemporary cartoon in *Melbourne Punch* entitled 'All in the Day's

[18] Age, 22 August 1894.

[19] (1930) 43 C.L.R. 493, at p. 501.

[20] Age, 22 August 1894.

Work' portrays Mr Turner as beating Patterson about the body, Sir Graham Berry as landing a telling blow to the jaw, Isaacs as trampling the prostrate body, and finally the damaged Premier on crutches observing, 'Well, it's pretty hot work, but one has to take a lot of punishment when fighting for the gate-money.'[21]

Patterson requested and was granted a dissolution and was decisively defeated at the ensuing election at which Isaacs was returned unopposed for Bogong. George Turner, who was the first native-born Victorian to become Premier of the colony, formed a government with Isaacs as Attorney-General. Acceptance of this office required Isaacs to resubmit himself for re-election at Bogong for the fourth time since his original election in 1892. This time he was opposed by one Joseph Ferguson, who had lost the Assembly seat of Ovens to Isaacs' younger brother, John. Ferguson's decision to contest Bogong was doubtless an act of pique which simply caused inconvenience to Isaacs who was returned with an overwhelming majority.[22] The *Age* in a thoughtful article asked whether the time had not come for the repeal of the requirement that a minister on re-appointment must resubmit himself for election to parliament. That requirement has long since disappeared.

Isaacs held office under Turner as Attorney-General from September 1894 until December 1899. The ministry then fell on a no confidence motion, but returned to office eleven months later and Isaacs once again became Attorney-General until his resignation to enter the first Commonwealth House of Representatives. During this period Victoria gradually emerged from depression. Recovery was slow and rather uncertain, but by 1899 the colony's economic position was considerably improved. Recovery was aided by the development and growth of the dairying industry, by a revival in gold mining and the growth of manufacturing industries, while improved refrigeration techniques gave a fillip to the export of frozen cargoes, particularly meat. The new prosperity was not the old 'imported' prosperity, depending on overseas capital, but was based more securely on internal development. The return of prosperity coincided with Turner's administration, which proceeded very cautiously with policies of retrenchment and 'prudent administration'. There were differences in emphasis in the policies of Turner and his predecessor, but they were not very great. One student of the period observes that the government:

[21] Melbourne Punch, 22 August 1894.

[22] 965 to 197.

> . . . did little that was constructive to stimulate revival. It preferred to wait for the return of better conditions before it acted, and took no account of the fact that it was helping by such inactivity to perpetuate stagnation in economic life.[23]

It took government many more years to learn that in depression it might be necessary to swim against the tide.

Isaacs, whom the *Bulletin* described as Turner's 'brilliant henchman'[24] was a prominent and energetic member of the ministry and served as Acting Premier during Turner's occasional absences. He was active in many fields. He took a leading part in the federation movement, and his role as a Victorian delegate to the Federal Convention of 1897-8 and in the events which followed and which culminated in the act of federation will be reviewed in the next chapter. One of his major concerns was the reform of the Victorian company law, a theme which found a place in his original electoral platform and in his statements during the Mercantile Bank case. In November 1894, shortly after his appointment as Attorney-General, he introduced a comprehensive company law measure into the Assembly. The bill contained numerous provisions to protect creditors and the public. A minimum amount of capital was required to be subscribed before the company could register, directors were required to keep proper books, the title 'Bank' could be used only in prescribed circumstances, there were provisions for the protection of a company's capital structure, civil and criminal penalties were imposed for fraud and for grossly negligent mis-statements, directors were made liable to make good their defaults, a special audit could be ordered of a company's accounts by the Governor-in-Council, and auditors were to be licensed and their duties regulated. Other provisions dealt with prospectuses, and with transfers of shares to avoid legal liabilities. Isaacs pointed out that a bill had previously been passed by the Legislative Council, but said that it was defective in that many of its provisions were 'destitute of the power of enforcement'[25] and failed to protect the public against the frauds which in recent years had been practised on them.

Early in 1896 Isaacs introduced a further amending bill which included clauses drawn from English legislation and amendments

[23] W. G. Sinclair: Economic Recovery in Victoria 1894-1899 (Australian National University Press 1956) at p. 51.

[24] 16 February 1895.

[25] V.P.D. (Victorian Parliamentary Debates) Vol. 75, at pp. 158-9.

proposed in the Assembly. He then said that the Victorian company law was in urgent need of modernization.[26] The Legislative Council made many changes in the bill and deleted various provisions, including clauses which imposed more rigorous liabilities on directors. Isaacs moved that the bill be set aside because of the Council's action. In March 1896 he re-introduced the bill in the Assembly, when he reviewed the Council's actions. He said that there were drastic provisions in the bill which were necessary to deal adequately with fraud.[27] On this occasion, the Council accepted some parts of the Assembly's bill but rejected significant provisions. Isaacs successfully urged acceptance of the Council's amendments in order to secure passage of a substantial portion of the original bill, though his arguments in support of this course were stigmatized by one member as 'the grossest case of backing down'.[28] On the other side, he was subjected to criticism for going too far. Sir John McIntyre, for the Opposition, put it that:

> any measure of the kind, which is of such immense importance to the mercantile community, ought never to have been undertaken by the Attorney-General, whose business knowledge is confined to his legal work in connection with business affairs. If the honourable gentleman had the slightest idea, from practical experience, of what it is to be connected with companies, the position would be different, but he really knows nothing of the subject. If he had the least modesty in him he would never have attempted to frame this bill, but would have remitted it to a committee of the business and legal members of the House.[29]

It was neither the first nor the last time that such arguments have been heard inside and outside legislative chambers. Isaacs' answer to criticisms, which took sometimes this form and sometimes the form of a charge that he was a prima donna seeking popularity and the limelight, was that the debates on company law reform pitted against each other 'those who have privileges and interests' and 'those who are fighting for the public'.[30]

On this issue he fought a good fight, and the company legislation which was passed into law was generally acknowledged as being in large part his personal achievement. As a leading member of the Opposition said on an occasion when the discordant voices of

[26] V.P.D. Vol. 79, at p. 4701. [27] V.P.D. Vol. 80, at p. 6293.
[28] V.P.D. Vol. 81, at p. 4919. See also pp. 4917, 4920.
[29] V.P.D. Vol. 81, at p. 128. [30] V.P.D. Vol. 81, at p. 687.

politics were momentarily stilled: 'The honourable gentleman deserved great credit for the work which he had done in connection with this subject. It was wonderful that he should have been able to prepare such a measure in the time at his disposal.' The press, and notably the *Age*, paid tribute to him for his work. It discoursed on the unsatisfactory state of company law in Victoria:

> The government which undertakes in real earnest the passing of an amended Companies Act, bringing the law abreast of the best thought in England, has taken up a Herculean labour comparable to the cleansing of a new Augean stable of the encrusted filth of a generation of bad deeds and engrafted customs. The Attorney-General cannot be robbed of the credit due to a persistent and able worker, who has read and adapted the best British legislation to the conditions of the colony, and who, having conceived and prepared his measure, has passed it through the popular House of Parliament. That it has been hacked about in the Council adds but another to the long list of unpatriotic acts which have distinguished a branch of the legislature that exists only to serve a limited circle of intensely selfish interests.[31]

That influential paper was a source of support to Isaacs in these years though it by no means stood alone in praising him for his work and parliamentary skill in promoting and securing company law reform. On other occasions and on other matters, he was not surprisingly exposed to press attack. The less friendly *Argus*, writing on tariff matters in mid 1895, singled out Isaacs and two other ministers as 'preferring place and pay to the keeping of promises made to their constituents', and as men whose conduct 'entitles them to the contumely of everyone who respects and expects straightforwardness in public men'.[32] Isaacs returned blow for blow; the *Argus* article he said was a 'glaring and scandalous piece of misrepresentation'.[33]

Isaacs was active in support of social legislation, of which some part found its way on to the statute book. This included factory and anti-sweating legislation; early in the life of the ministry Isaacs lent his support to a motion of the Labour member Trenwith that the government should prescribe minimum wages to be paid by its contractors.[34] He moved legislation to restrict and control the attachment of the wages of low-paid workers;[35] he supported the Employers' Liability Amendment Bill which provided for pay-

31 Age, 23 December 1896.
32 Argus, 20 July 1895.
33 Herald, 22 July 1895.
34 V.P.D. Vol. 76, at p. 1791.
35 V.P.D. Vol. 80, at pp. 5195, 5850; Vol. 88, at p. 409.

ment of compensation to workers injured in the course of employment. He argued that this legislation should have a wide scope and opposed provisions setting short notice and enforcement periods.[36] He lent his support to the wages board legislation for which his colleague, Alexander Peacock, the Chief Secretary, was principally responsible.

He was active in other fields of legislative activity: in the control of gambling, about which, inside and outside the House, he spoke in strong and censorious terms; he promoted reform in the insolvency law which had been scandalously defective in its protection for creditors, and had enabled many land boomers to be freed without publicity from their enormous liabilities. He supported women's suffrage and attacked plural voting and on these matters, as on company and factory law reform, he tangled with the Legislative Council. Sidney and Beatrice Webb were in Australia in 1898 and were present at a debate in the Victorian Legislative Council on the Franchise Bill which, *inter alia*, purported to abolish plural voting. Their comments on that House were to the point.

> This upper chamber is perhaps the most reactionary in the British Empire. . . . Its appearance is far from august: the members are nearly to a man old if not aged: a mean undignified set of little property owners, with illiterate speech and ugly manners: no refinement or breadth of culture, just narrow-minded grasping lower-middle-class men—the quintessence of vestrydom.[37]

The *Bulletin* in 1895 noted the ministry's difficulties with the Council and observed that Turner and Isaacs would move to include the referendum (a favourite device of Isaacs) as a remedy for the state of chronic deadlock between the Houses. With robust good sense the *Bulletin* observed that that device was:

> just as adequate to the case as would be a pint of water to extinguish Gehenna, and it is likely to be fully as effective as a reproachful look directed to a herd of stampeded cattle.[38]

The Webbs singled out Isaacs for special, although somewhat curious and uncomfortable commendation in their diary. The words are those of the formidable Beatrice:

[36] V.P.D. Vol. 83, at pp. 3269, 3270, 3281.

[37] The Webbs' Australian Diary 1898, ed. Austin (Pitmans 1965) at p. 66.

[38] Bulletin, 16 February 1895.

There is in fact only one man of talent in the Ministry—Isaacs, the Attorney-General. He is a typical clever young Jew: a good lawyer with an acute well-informed mind. He is an Imperialist and the night he dined with us he began by a rhapsody over the Empire; when he saw, however, that we were not impressed he went on to explain his new Bill against Usury, assuming that we, as socialists, should approve of it. In this explanation as well as in his memorandum and in the Bill itself, he shows a true Jewish combination of quick but superficial learning and ingenuity of treatment: whether it will serve its purpose I have not the knowledge of the subject to foretell. In a somewhat grandiose way this able young lawyer is trying to keep abreast of the legal lore of England, America and Europe. He is the only man we have met in the colonies who has an international mind determined to make use of international experience. And this, in spite of the fact that he has never left Australia. A pretty little trait, thoroughly Jewish, was his unconscious remark—to prove his absorption in public business—that he had not seen his parents for a whole fortnight except to catch sight of them out driving. Towards the institutions of the colony he assumes the attitude of unqualified admiration: the administration of the land and railways is beyond criticism, the civil service is beyond reproach in honesty and efficiency, even the present statistician—Fenton by name (a hopelessly incompetent person whom we had interviewed that very morning) is an 'extremely able man'. This last touch made us a bit impatient, because Isaacs ought to have recognized that we could not be humbugged to that extent. Like many clever pushing Israelites he presumes too much on the stupidity of the Gentile. He will also have to rid himself of the outer manifestations of a childish vanity. But he will rise.[39]

The Webbs proved themselves in many cases to be quite unsuitable and incompetent observers of Australian society.[40] Deakin's biographer, La Nauze, says that, in some respects anyway, they were widely astray in their assessments of Deakin, and that the diary, generally, was 'an instructive mixture of shrewd comment and impenetrable conceit'.[41] Certainly Beatrice Webb's constant harping on Jewish characteristics is extravagant and not a little absurd. Isaacs the imperialist rings true; this comes through his writings and utterances on the Bench, as Governor-General and in later life. The comment on the superficiality of his learning is harsh; he

[39] The Webbs' Australian Diary 1898, at pp. 68-9.

[40] ibid, introduction by A. G. Austin, at p. 13.

[41] La Nauze: Alfred Deakin Vol. 1, at p. 150.

prepared his political and his legal cases exhaustively and, as his auditors and readers not infrequently complained, exhaustingly. On occasion he may have been guilty of forensic and literary sleight of hand, but it is quite another thing to stigmatize his work as superficial. But overall, the picture and the judgment of Isaacs, though stated with intolerable condescension and style, was very favourable and in its most important aspects, accurate.

There is another important contemporary description of Isaacs, written by Alfred Deakin in 1898. Deakin, like Isaacs, was a Victorian delegate to the Federal Convention of 1897-8 and throughout the nineties was a private member of the Victorian Legislative Assembly and a practising member of the Bar. Deakin's portrait is a lengthy one, but its importance is such that it merits quotation in full:

> Turner was of the English type, fat, fair, solid, thick-necked and with a large even head. Isaacs his colleague was a short, spare, dark-skinned Jew with a thin neck, protruding lips, large nostrils and a high, narrow retreating forehead. His figure was loose and ill-made but it was his hands and head that were most remarkable. The hands were so heavily jointed and knuckled that they were almost deformed, the fingers flat-topped and the whole bony. The head was extremely long from the eyebrows which projected like a penthouse over the eyes to the point of the back brain which was equally prominent behind. From each of these extreme points the head sloped rapidly to a narrow ridge almost with an apex but not high above the ear though fairly broad at the base of the brain. Looked at from the front or back it was roughly triangular receding to the crown. What redeemed a face which was certainly plain, and a figure that was ungainly, was the fire in the eye and the energy in the motion by which the whole was rendered tense, taut and agile. His smile was bright, light and winning in its regard either to his family, his intimates or the stranger he was welcoming, but the nostril quivered and the brows lowered readily upon provocation which he was not slow to take, though often slow to express. The son of a struggling tailor in an up-country town, he had as unpromising an outlook as could well be imagined for such a career as his proved. First a State School teacher and then a clerk in the Crown Law Office, he was everywhere saving to penuriousness, strenuous in self-education, resolute to succeed. He practised his French accent by following an itinerant Gallic knifegrinder from street to street, book in hand and engaging him in conversation. German he readily conquered and the classics offered no obstacle. Called to the Bar, he was eager for work, and willing to seek it, unwearying in preparation and dauntless in

Court where his acuteness and thoroughness soon helped him to the front. But he did not relax his efforts and soon was in receipt of a large income out of which he generously provided for his parents, his brothers and finally his wife and children. There his unselfishness and generosity stopped short. Intellectual to the finger-tips and gifted with a marvellous memory, he was always acquiring knowledge, reading widely in all fields and it is said commencing the violin when approaching his fortieth year. He entered politics like Turner as a Liberal with Conservative leanings and was a member for a time of a Conservative Ministry, but under the stress of antagonism to his old colleagues and his sense of the requirements of the political situation, soon laid all his Conservatism aside and began to qualify for the future Radical leadership. While Turner's opinions were derived from actual political work, Isaacs' were carefully read up and elaborated from such authorities as he could consult, with whom he soon made himself thoroughly familiar. A clear, cogent, forcible and fiery speaker, he set himself at once to work to conquer the methods of platform and parliamentary debate and in both succeeded. He was not trusted or liked in the House. His will was indomitable, his courage inexhaustible and his ambition immeasurable. But his egotism was too marked and his ambition too ruthless to render him popular. Dogmatic by disposition, full of legal subtlety and the precise literalness and littleness of the rabbinical mind, he was at the same time kept well abreast by his reading of modern developments and modern ideas. He supplied the basis of literature and theory that Turner lacked, while from Turner he began to learn the arts of managing men and conducting business in the practical municipal way.[42]

There are various head and shoulders photographs and sketches of Isaacs in the newspapers and journals of the nineties and they scarcely justify Deakin's vivid though not very attractive physical description of him. They reveal a slight, intense man of not unpleasing appearance with a heavy moustache waxed at either end. Certainly they come as a surprise to one who has just read Deakin's description, and one may guess that Deakin was somewhat carried away by the drama of immediately past events, which he was depicting in a manuscript which he never revised and which was written at high speed.[43] But if the physical picture was overdrawn, the general estimate was in many respects sound. It acknowledges high ability, vast energy and great resources of knowledge. The subtlety, which in the context means over-subtlety, was

[42] Deakin: The Federal Story (1963) at pp. 69-70.
[43] ibid, at p. xi. See La Nauze: Deakin Vol. 1, at pp. 197-9.

confirmed by the judgment of men at later stages of his life, among others by Garran, who worked closely with him when he was Attorney-General in 1905-6.[44] It is reflected also in his work as a High Court judge; over-subtle and irritating points, as well as arguments of great power and persuasive force, found their way into judgments, and where they did, they did not improve them. Isaacs never really ceased to be an advocate.

Deakin's statement that Isaacs was never liked nor trusted in the Legislative Assembly is interesting and important. The Mercantile Bank case, not surprisingly, contributed to this; though Isaacs won popular acclaim then, he also sowed deep seeds of distrust. He was marked out as a man to be reckoned with, though not as one to whom colleagues would warm or regard with personal confidence and intimacy. Deakin makes this point very clearly in his accounts of the events of the convention, and I have already referred to the distrust and dislike of him by some at least of his colleagues on the Bench. This is not to be dismissed wholly as jealousy, anti-Semitism or other prejudice of this sort, though there was prejudice and ugly and unworthy things were said and written about him. The fact that a man at successive stages of his life should earn such suspicion and dislike cannot be lightly dismissed. Isaacs was a lone wolf and a determined, ambitious and unrelenting man. It is not however true, as Deakin says, that his acts of kindness and generosity stopped with his immediate family; there are too many records of acts of kindness and friendliness at various stages of his life to people in diverse walks of life, sometimes modest and humble. But this side of his character did not readily appear to the men with whom he was directly associated in professional and judicial life.

Isaacs was in London for most of 1900, where he closely followed the political events which culminated in the passage through the United Kingdom parliament of the Commonwealth of Australia Constitution Act. In November of that year the second Turner ministry came into office with Isaacs once again as Attorney-General, and he was much involved with the necessary steps and machinery which attended on the impending federation of the Australian colonies. Both Turner and Isaacs had announced their intention of seeking election to the new Commonwealth House of Representatives, and Turner immediately became Treasurer of the first

[44] Prosper the Commonwealth, at p. 158.

Commonwealth ministry led by Edmund Barton as Prime Minister. Following this, Isaacs became Acting Premier of Victoria at the beginning of 1901.

The question of the succession to the premiership of Victoria was actively discussed. On 18 January the cabinet met to discuss the matter and Turner read a statement which was made public:

> Members of the government have been unanimous in pressing upon the Attorney-General, Mr Isaacs, the desirability of his remaining in the local parliament and succeeding me as Premier of the State. Mr Isaacs' personal desire is, however, to enter the federal parliament and he has given a public assurance that he would become a candidate for a seat in the House of Representatives. That assurance was given some time ago, and his own opinions continue unchanged. All his colleagues in the ministry have very strongly urged him to remain in the State parliament, if he can possibly see his way clear to do so, but his present inclinations and his promises are at the present time somewhat against us. However, yielding to the earnest entreaties of his colleagues, pressed upon him after the fullest consideration, Mr Isaacs has promised to take until Monday next to determine what is the desirable course to be pursued in the circumstances. If he remains in State politics it is our unanimous wish that he should accept the Premiership. We have all strongly urged him to do so. Should he decide, however, to enter the federal parliament, the whole question as to who should succeed to the leadership of the government will have to be discussed. We have not considered that phase of the matter.[45]

On the same day the *Argus* said that it had generally been assumed that Peacock, the Chief Secretary, would succeed Turner, as Isaacs had declared his intention of running for the federal parliament, but it noted that after Turner joined Barton's cabinet, Isaacs had claimed that, as the senior minister next to the Premier, he had a right to the reversion of that office. The *Age* editorially supported Isaacs' claims and urged that he should stay in State politics where he was not easily replaceable and where:

> there is unquestionably an urgent need for his experience, his statesmanship and his unflinching Liberalism . . . More than once in his past career Mr Isaacs has made the more arduous and unselfish choice. Let us hope that he will once more show his high regard for the calling of patriotism by giving up federal service for a time and remaining as the Liberal leader in State politics.[46]

[45] Age, 18 January 1901.

[46] Age, 19 January 1901.

Isaacs, however, told the cabinet that he had decided not to accept the offer to become Premier. He said that in reaching this conclusion he was influenced by his public announcement that he would offer himself for election to the House of Representatives. Pending the federal elections he would remain Attorney-General.[47] The *Argus* allowed itself the comment that the whole episode was a little comedy; the offer of the premiership to Isaacs was made on the well-understood condition that he would reject it; it had 'deceived no-one and amused all'.[48] Peacock became Premier, Isaacs offered himself for election in Indi and was returned as a member of the first House of Representatives. He was sworn in as a member of that House on 9 May 1901, though he did not formally relinquish the office of Attorney-General of Victoria at that time and continued to hold it at the request of the Governor until 4 June 1901.

[47] Argus, 22 January 1901

[48] Argus, 23 January 1901

4

Founding Father

THE FEDERAL CONVENTION 1897–1898

IN HIS ADDRESS to the electors of Bogong in 1892, Isaacs made favourable reference to the project of Australian federation. The federation movement had gathered strength during the middle and latter eighties. In 1885 the Federal Council of Australasia was established by imperial Act; it was a body with very limited powers and was much weakened by the refusal of New South Wales to participate, and South Australia was a member for only two or three years. During the eighties there was a growing concern with the deficiencies of the colonial defences and some apprehension of the designs of foreign powers in areas close to Australia. A senior British military officer, General Edwards, was invited to report on the state of the colonial defences. His report, which recommended inter-colonial co-operation, furnished the occasion for a famous speech by Sir Henry Parkes, Premier of New South Wales, in 1889 in which he called for a national convention to draft a federal constitution. Defence was not the only issue of course; this was a time at which an Australian nationalism was developing; and concern with various problems which transcended colonial boundaries prompted some, though by no means all Australians to argue the need for a new Australian federal political entity.

Parkes' initiative was followed by a preliminary Federal Conference at Melbourne in 1890, and that in turn was followed by a Federal Convention which met in Sydney in March 1891. The convention was attended by forty-five delegates, forty-two from the six Australian colonies and three from New Zealand. The delegates were representatives of the colonial legislatures; Alfred Deakin was a Victorian representative and Edmund Barton a delegate from New South Wales. Isaacs, not yet a member of the Victorian legislature, took no part in the convention. A constitution bill was drafted and adopted by the convention; its principal drafts-

man was Samuel Griffith, then Premier of Queensland.[1] The hope that the bill as approved by the convention would be considered and approved by the colonial legislatures proved false; changing political configurations in the legislatures and the pressing economic problems of the early nineties loomed large and urgent, and it was shelved. Deakin spoke vigorously in support of the Federal Constitution Bill in the Victorian Legislative Assembly, but by 1892, when Isaacs first become a member of the Assembly, the economic crisis had deepened, and governmental interest in federation was at a very low ebb.

Outside the colonial legislatures, interest in federation was kept alive by the Australian Natives Association (founded as a friendly society in 1871) and by the Federation Leagues which were founded during the nineties. The A.N.A. had been active in support of federation at the time of the Melbourne meeting of 1890 and the Sydney convention of 1891. With the increasing pressures of economic problems, the interest of the A.N.A. languished in the following year, but revived in 1893. Isaacs was an active member of the A.N.A., and during 1893 he spoke at various branch meetings on federal themes. In October he spoke to the South Melbourne branch on the future of Australia. He said that Australians must be a united people, that colonial fragmentation was an obstacle to the adequate defence of all the colonies, and he drew attention to the diversity of colonial laws which, he said, led to bickering and hostility. He advocated inter-colonial free trade and pointed to the example of Canada which had accomplished a union of states in face of greater difficulties than now faced the Australian colonies. In November he addressed the Ballarat branch on the same subject. This time he pointed also to the example of the United States. He said that it was desirable to have a national company and divorce law, and that, above all, he looked forward to the day when he could say, 'I am an Australian.' When federation came in 1901, the constitution furnished legislative power to enact a national divorce law. Isaacs called for action on this matter again from the Bench in 1913,[2] but his words fell unheeded and it was not until 1959 that the Commonwealth parliament took

[1] He was later Chief Justice of Queensland and then first Chief Justice of the High Court of Australia. La Nauze: Alfred Deakin Vol. 1, at p. 154 writes: 'Precise, cold, cautious and patient, Griffith was a draftsman of superb capacity; and the framing of a constitution required, not emotion, but clarity of mind.'

[2] *Fremlin v. Fremlin* (1913) 16 C.L.R. 212, at p. 230.

comprehensive action.[3] A uniform (*not* a national) companies law had to await agreement between the States and came even later.

Isaacs also spoke late in 1893 at an A.N.A. conference over which Deakin presided. It had been called to discuss the question of Australian federation and the obstacles to its implementation. Isaacs argued that federation had not been made sufficiently a people's question, and he called for action to arouse popular interest. Once again he proposed the immediate adoption of inter-colonial free trade. In 1893 action had been taken by the A.N.A. to popularize federation, and the association promoted the establishment of a federation league. In the winter of 1893, a conference at Corowa, New South Wales, adopted resolutions calling for the framing of a federal constitution by a popularly elected convention and for the submission of the constitution drafted by it to referenda in the several colonies. It was proposed that Enabling Acts should be passed by the colonial legislatures to implement these resolutions.

The Corowa scheme was finally adopted. George Reid became Premier of New South Wales after the 1894 election, and he proposed the discussion of these matters at the Premiers' Conference to be held at Hobart in January 1895. Turner by this time was Premier of Victoria and Isaacs was his Attorney-General.

The Premiers agreed to the adoption of the Corowa proposals with certain modifications. There were further delays, and the Victorian Enabling Bill almost came to grief in the Legislative Council, but was finally passed. It provided for direct popular election of ten delegates to a Federal Convention, for the adjournment of the convention to allow consideration by the colonial legislature of the proposed constitution bill, for the submission of the constitution as finally adopted by the convention to a referendum and, if approved, for its submission to the United Kingdom parliament for adoption as an Act of that parliament. Similar Enabling Acts were passed in New South Wales, Tasmania and South Australia. Queensland, deeply involved with internal problems, did not send representatives to the convention, and Western Australia's representatives were nominees of the colonial legislature.

The election of the Victorian delegates took place in March 1897. There were two lists of candidates, one promoted by the *Age*, the other by the more conservative *Argus*. Isaacs appeared on the

[3] Matrimonial Causes Act 1959; on marriage, see Marriage Act 1961.

Age ticket: its 'liberal ten' were all elected with Isaacs in fifth place. Ahead of him in order were the Premier George Turner, John Quick of Bendigo, whose name was associated with the Corowa proposals of 1893, Alfred Deakin, and A. J. Peacock the Chief Secretary.[4] Isaacs campaigned vigorously and spoke at length at various centres. He restated the points he had made in earlier speeches, and he dealt comprehensively with the problems of the relations between the two proposed houses of the federal parliament. For a Victorian radical, frustrated by the obstruction of the Legislative Council, this was not surprising. As he put it in a speech at Wodonga:

> We have had sad experience in Victoria of deadlocks and no greater calamity can befall a country or legislature than to find themselves with the possibility of a collision without any means of averting it.

The convention assembled in Adelaide in March 1897; it then adjourned for consideration of the draft bill and reassembled in Sydney for an intermediate session in September 1897 and a final session was held in Melbourne which concluded in March 1898. In all, the delegates were engaged in close debate for some five months.

According to Deakin[5]—and he was in a good position to know[6]—it had been originally agreed that the convention should meet first in Melbourne, but a cabal of South Australian, Western Australian and Tasmanian interests led to the choice of Adelaide. Deakin also says that had the convention first met in Melbourne it was arranged that 'Turner would be its president and Isaacs undertake the formal control of business'.[7] Garran, who went to the convention as secretary to Sir George Reid and became secretary to the drafting committee, says that this was not well founded in its reference to Isaacs.

> If the first session had been in Melbourne, doubtless Turner would have been chosen to preside, in accordance with tradition; but I cannot understand the suggestion that Isaacs would have been in charge of business. There was no tradition as to that and the convention would certainly have turned down any such proposal.[8]

Isaacs was not a popular man, and at this stage he was certainly not a leading figure in the federal movement. Edmund Barton of

[4] Behind Isaacs came Trenwith, Berry, Fraser, Zeal and Higgins.
[5] The Federal Story, at p. 75.
[6] Garran: Prosper the Commonwealth, at p. 110.
[7] The Federal Story, at p. 75.
[8] Prosper the Commonwealth, at p. 110.

New South Wales had been a member of the 1891 convention, and during the intervening years he had emerged as an acknowledged leader of the federal movement. His claims to be in charge of business were very strong and he was named as leader of the convention. Charles Cameron Kingston of South Australia was elected president.

Deakin's contemporary account of the convention[9] which appears unrevised in the pages of *The Federal Story* has much to say about his fellow Victorian delegate Isaacs, and his role in the proceedings. He says that Isaacs was antagonized and humiliated by his failure to gain formal recognition. Isaacs was nominated for membership of the drafting committee, and was very well qualified for membership of that committee, but Barton and R. E. O'Connor of New South Wales (both subsequently Justices of the High Court of Australia) and Sir John Downer of South Australia were elected. The defeat of Isaacs was according to Deakin:

> occasioned purely by personal motives and from personal dislike and was brought about by a plot discreditable to all engaged in it. The unhappy incident had an injurious effect upon Isaacs whose hostility to the bill preceded its appearance and was but partially conquered by his splendid self-restraint . . . Isaacs' tendency to minute technical criticism was sharpened so as to bring him not infrequently into collision with the [drafting] committee when the measure came on for debate, and though this diminished with time it reappeared at the very close of the proceedings and threatened the adoption of the measure by his ministry.[10]

Deakin praised Isaacs for his subsequent performance and actions in the convention. When the move was made to Sydney in the spring of 1897, Isaacs:

> with magnificent self-restraint subordinated his sense of personal injustice and won high appreciation by the keenness of his legal criticisms and the fullness of his general knowledge.[11]

And at the final Melbourne session:

> Isaacs [was] more appreciated for his unflagging energy, industry and acumen. . . . At the close of the convention, without assigning their

[9] The narrative was begun in March 1898 in the closing days of the convention and much of it was written within the next few months. The account of the conclusion of the movement and its final stages in London was added in 1900.

[10] The Federal Story, at pp. 81, 82.

[11] ibid, at p. 87.

precise individual order even in their colonies, it may be said that the first rank of men of influence at the final sitting when staying power had asserted itself consisted of Barton, O'Connor, Reid, Kingston, Holder, Turner, Isaacs and Forrest.[12]

Isaacs was certainly not deficient in staying power, learning, or capacity for legal criticism, as the more than five thousand pages of the record of the convention testify. He was certainly one of the ablest and best informed members of the convention; his speeches reveal detailed and well digested knowledge of the legal and political experiences of federation in the United States, Canada and Europe. Isaacs later said that he had read through the five volumes of Elliot's *Debates on the General State Conventions on the Adoption of the Federal Constitution* to inform himself thoroughly of the American experience.[13] He was aided by a remarkable memory which could produce all sorts of facts and authorities at will. For example, when it was proposed to write into the constitution a clause providing that:

> The citizens of each State, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth shall be citizens of the Commonwealth and shall be entitled to the privileges and immunities of citizens of the Commonwealth in the several States, and a State shall not make any law abridging any privileges or immunity of citizens of the Commonwealth, nor shall a State deprive any person of life, liberty or property without due process of law, or deny any person within its jurisdiction the equal protection of the laws,

Isaacs was quick to argue that this was an inappropriate transcription from the United States constitution. He pointed out that while the words sounded well and were deceptively clear, they had given rise to all manner of legal complexity. He developed this point with an elaborate analysis of the American civil war and its consequences, including the Fourteenth Amendment to the United States constitution, for it was that Amendment which had inspired the proposed clause. In Australia, Isaacs said, there were not the social and political factors which demanded a copying of the Fourteenth Amendment.

[12] at pp. 90, 91.

[13] Dixon: Jesting Pilate and Other Papers and Addresses (Law Book Company 1965) at p. 167.

> I say that there is no necessity for these words at all. If anybody could point to anything that any colony had ever done in the way of attempting to persecute a citizen without due process of law there would be some reason for this proposal. If we agree to this we shall simply be raising up obstacles unnecessarily to the scheme of federation.[14]

With copious illustration from American sources he warned of the difficulties.

> When it [equal protection] comes to be practically applied it raises up almost insuperable difficulties. With regard to the other part of the clause, about due process of the law, there is an equal difficulty. . . . What necessity is there for it?[15]

Certainly in the range and scope of his learning on such matters, Isaacs was unrivalled in the convention, and in the particular context his knowledge was usefully applied to point to unseen dangers and difficulties. But long expositions and analyses wearied both lawyer and non-lawyer members of the convention. One or two illustrations may suffice. P. M. Glynn of South Australia, later, in 1909, Attorney-General of the Commonwealth, and a man of considerable legal, constitutional and general knowledge, was arguing that an express provision should be written into the constitution to make the Commonwealth liable in contract and tort. Isaacs opposed this course and argued that it was preferable to achieve the object by ordinary legislation. Glynn referred to an American case to support his argument and Isaacs interjected:

> Mr Isaacs: Does the honourable member refer to the case of *Chisholm v. Georgia*, when the Supreme Court decided that a state could be sued under the Constitution? It required the eleventh amendment to reverse that.
>
> Mr Glynn: A man would have to live to the age of Methuselah to cultivate a memory equal to remembering all the cases which the honourable member is always referring to.[16]

It was not surprising that members should become restive during Isaacs' extended discourses on American and other bodies of foreign jurisprudence. There were various exchanges, more or less good-humoured:

[14] C.D. (Convention Debates) Melbourne 1898, Vol. 1, at p. 688.

[15] ibid, at p. 687.

[16] C.D. Melbourne 1898, Vol. 2, at p. 1675.

Mr Isaacs: In the United States—

Mr Fraser: We have had enough of the United States.

Mr Reid: Why don't you give Canada a turn?

Mr Isaacs: I have no doubt the honourable member's knowledge of Canada is about equal to his knowledge of the United States.[17]

and perhaps the most moving *cri du coeur* came from a South Australian delegate, V. L. Solomon, at the Sydney session of the convention:

> I am rather inclined to believe . . . that it would have been a very good thing if we could have arranged for an exploration party to go through all the various libraries of the colonies and burn all the works of reference on the American, Canadian and Swiss constitutions. We should have been saved some hours of very eloquent dissertation accompanied by enormous extracts from the works of writers who did not write with knowledge of our present circumstances.[18]

None of this had any effect, nor was it likely to influence Isaacs. His interjections pepper the pages of the debates. The scene has to be reconstructed from the printed page: Isaacs appeared to be so immersed in the flow of the argument that he could never refrain from a comment, a question or an expression of opinion. Very few speeches were made which did not prompt some interjection from him. This was not calculated to endear him to the other delegates and he was not generally liked. Deakin records in *The Federal Story*[19] that Barton 'cordially disliked' Isaacs and this certainly dated from the days of the convention when the two men were thrown together for the first time. They were men of very different temperament and outlook, and were not likely to become close friends. But there was active dislike, certainly on Barton's part and quite likely on Isaacs', though on ceremonial occasions, in the convention, in the Commonwealth parliament and later on the High Court Bench, Isaacs spoke in praise of Barton. In Barton's private correspondence with his friend Griffith, when both men sat on the Bench of the High Court with Isaacs, there are harsh and ugly words of dislike and expressions of deep distrust of Isaacs. Barton and Isaacs clashed on more occasions than one in the

[17] C.D. Melbourne 1898, Vol. 1, at p. 311.

[18] C.D. Sydney 1897, at p. 747. [19] at p. 81.

convention debates. For example, at Adelaide Isaacs was concerned to point out in a particular context that certain words were sloppy drafting and should be replaced by others. To many the argument seemed a quibble, and there was considerable impatience in the convention. Barton exploded: 'How are we to do our work if we debate matters of this kind? . . . Amendments of this sort have no sense or meaning or effect on the legal force of the bill.'[20] Isaacs' answer was short and not conciliatory: 'It is a work which is to stand for all time, and we ought to do it properly.'[21] No one could dispute that, but it was the way in which he went about things that raised the hackles of fellow delegates, and this served to diminish his influence. Deakin spoke of him as 'dogmatic by disposition, full of legal subtlety and the precise literalness and littleness of the rabbinical mind',[22] no doubt with a picture of Talmudic disputation and scholarship in mind, and it is not difficult to see what he meant.

Too often perhaps, dogmatism and pedantry were combined with rudeness, and Isaacs said harsh things of his fellow delegates. Again by way of illustration: Sir William Zeal, a Victorian fellow delegate, made a speech in which he argued that much expense would be saved if the proposed High Court of Australia were reduced in membership, and he made some reference to Canadian judicial experience. Isaacs interjected throughout the speech, and at its conclusion he rose to speak.

Mr Isaacs:	I desire to say one or two words that have been called forth by Sir William Zeal who, on this occasion as on some others, has mistaken some strong personalities for arguments. They are weak arguments but strong personalities.
Sir William Zeal:	Then they would not influence you.
Mr Isaacs:	I am sure that reason seldom influences my honourable friend.
Sir William Zeal:	It never influences you.
Mr Isaacs:	I should like to point out how utterly ignorant the honourable member is of the judiciary system of Canada.[23]

[20] C.D. Adelaide 1897, at pp. 620, 621.
[21] at p. 620.
[22] The Federal Story, at p. 70.
[23] C.D. Melbourne 1898, Vol. 1, at p. 301.

Thereupon Isaacs proceeded to read Zeal a long lecture on the Canadian system.

This is one of many examples. No doubt, during these months of close association and debate it was to be expected that there would be clashes of viewpoint and personality. Reid later recalled that 'the debates were often intensely vigorous, and sometimes developed sharp conflicts',[24] and Isaacs received just as he gave. In one of the last meetings of the convention in Melbourne, the chairman asked a South Australian delegate to stop interrupting Isaacs during a speech. Isaacs took the opportunity to state his views on interjections:

> As far as I am personally concerned, of course, I do not object to any interjection which may tend, as it often does, to elucidate the matter, and by drawing forth a reply, may save more than one speech afterwards.[25]

But however Isaacs explained his own attitude and feelings, it is apparent that his own constant interjections annoyed and irritated many of his fellow delegates.

This serves to explain why Isaacs, here as elsewhere, was not popular and effective with his colleagues. Deakin strove to be fair in his judgment; he noted Isaacs' defects and he assessed them pretty well; at the same time he was generous in his praise of skill, learning, energy and intelligence, and he freely acknowledged Isaacs' massive and important contributions to the debates and he praised him for self-restraint in the later stages of the convention in the face of slight and hostility. This judgment too is for the most part confirmed by the printed record, and it has been justly said by a later writer that Isaacs was 'one of the ablest and best informed members of the convention'.[26] Garran in his account of the convention proceedings had very little to say about Isaacs; the only reference to him was an excerpt taken from his diary for 28 February 1898:

[24] My Reminiscences (Cassell & Co. 1917) at p. 134.

[25] C.D. Melbourne 1898, Vol. 2, at p. 2176.

[26] Hunt: American Precedents in Australian Federation (Columbia University Press 1930) at p. 139. Hunt also writes at pp. 31-2: 'He [Isaacs] participated in the debate on every important question and invariably threw upon them the light of experience of Australia, England and America. His command of history and the fullness of his knowledge of law and legal decisions, especially of the United States, while trying to non-legal delegates and to his opponents, carried weight and conviction.'

> As to the railways, the Victorians were playing a big bluff, but as usual climbed down when they saw it was no use. Isaacs was the serpent and led Turner into an impossible position; but at last Turner asserted himself, kept Isaacs quiet and compromised on a basis which quite satisfied Reid.[27]

The first question of substance for the convention was whether it should accept the 1891 constitution bill as a preliminary draft from which it should work, or whether it should put that aside and start afresh. Isaacs supported the view that a fresh start should be made, and this view prevailed though of course there was much reference back to the 1891 draft. Griffith, who had been the principal draftsman of the 1891 bill, was not a member of this convention; there were no Queensland representatives, and he in any event was at the time Chief Justice of Queensland. He was, however, unofficially consulted on various matters during the meetings of the convention.

A matter which loomed large in the convention debates was the definition and formulation of the powers and composition of the Senate and its relationship to the House of Representatives. It was on this subject that the battle lines were drawn between the 'big' States, Victoria and New South Wales, on the one side, and the smaller colonies on the other. The South Australian, Western Australian and Tasmanian delegates desired to establish the Senate as a powerful, influential and perhaps the dominant arm of the new federal government. They were insistent that it be composed of equal numbers of members from each State and they sought for it wide powers, including power to amend financial legislation. The Victorian and New South Wales delegates on the other hand endeavoured to limit the power of the Senate and wished the seat of power to be in the House of Representatives which more directly represented population concentrations.

The supporters of a strong and powerful Senate were likewise unsympathetic to responsible or cabinet government which found no place in the United States constitutional system and which depended for its effectiveness on responsibility to one House of the parliament and that meant the predominance of that House. As the president of the South Australian Legislative Council, Sir Richard Baker, who was a delegate from that State, said at the Adelaide session of the convention:

[27] Prosper the Commonwealth, at pp. 120-1.

> I am afraid that if we adopt this cabinet system of Executive it will either kill federation or federation will kill it; because we cannot conceal from ourselves that the very fundamental essence of the cabinet system of the Executive is the predominating power of one Chamber.[28]

If responsible government implied responsibility to the House of Representatives, Baker argued, 'It seems to me, undoubtedly, that the powers of the Senate will wane until it becomes only a dignified appendage of the House of Representatives.'[29] Isaacs met this with a formidable response delivered with characteristic hyperbole:

> [When] we are invited to surrender the latest-born, but, as I think the noblest child of our constitutional system . . . I feel in my heart that we are asked to reverse a century of development; that we are asked to deny an absolute and fundamental principle of our political existence—that we are asked, in short, to do what not only is inexpedient but utterly impossible. To stand here, sent as we are by the people of these colonies and to forget the struggles and the triumphs which have made our constitutional system what it is—at once the pride and the hope of millions of our fellow subjects in various parts of the Empire, and the admiration, nay the envy of other nations, both unitary and federal, who have striven in vain to imitate its excellences—would be to earn for ourselves the contempt and the execration of those whose trust we bear to this convention.[30]

Isaacs conceded Baker's point that the principle of equal powers for both Houses was foreign to responsible government but drew the conclusion that equal power must yield. 'I take it as an incontrovertible axiom that responsible government is to be the keystone of the arch.'[31] He re-emphasized this point when he introduced a discussion of the constitution bill in the Victorian Assembly, after the convention had adjourned at the close of the first Adelaide session. There he said that responsible government did not exist in the United States and that care must be taken 'that no such catastrophe occurs here'.[32]

On this point, the views expressed by Isaacs prevailed; section 64 of the Commonwealth constitution requires that every minister shall be or become a member of either House of the parliament. That

[28] C.D. Adelaide 1897, at p. 28.
[29] at p. 29.
[30] ibid, at p. 169.
[31] ibid.
[32] V.P.D. 20 July 1897.

does not spell out the full content and detail of responsible government, which had to be worked out by supplementary constitutional conventions. On the matter of the structure and powers of the Senate Isaacs also had much to say. He asserted that equal representation of the federal units in one of the legislative chambers was not an essential of federalism, that equal representation was a 'vicious principle', which was 'indefensible on the ground of reason and logic' and was 'branded with the disapprobation of history'.[33] At Adelaide he made a long speech in which he argued, with a wealth of detail, that equal representation in the United States Senate was the result of a compromise rather than acknowledgment of a fixed principle of federal government.[34] Moreover he perceived a contradiction in the claim that the States must be protected by equal representation.

> It is because we assume as a starting point that there is no divergence of interest that we attempt to federate at all, and we are doing something self-contradictory when we say in one breath that we federate on these subjects as one united people without regard to State distinctions because our interests are identical in these matters, and in the next breath turn around and say we must have equal representation in the Senate because we must protect the diversity of our interests in these matters. If our interests are not identical, do not federate.[35]

That was a politician's argument and fooled no one.

Isaacs doubted whether, even with equal representation, the Senate would ever be a States' House.

> Men do not vote according to the size of their States. Do you find all the people in one particular State voting one way? Not at all. What is there diverse in the interests of these various States? What is there that would lead New South Wales and Victoria to coalesce against any of the other States? How do the interests, industrial, political or social, of what are called the larger States conflict with similar interests in other States? Why, Sir, artisans in one colony have interests identical with artisans in another; merchants in one with the merchants of another; and wool growers in one with the wool growers of another; while the interests of the people are those of one people.[36]

[33] C.D. Sydney 1897, at p. 304.

[34] C.D. Adelaide 1897, at pp. 170ff.

[35] ibid, at p. 544.

[36] ibid, at pp. 173-4.

But Isaacs knew well that as a matter of hard political fact, equal representation was the price of any agreement to federate Australia, and he said so quite clearly to the convention[37] and in his report on the proceedings at Adelaide to the Victorian Legislative Assembly. 'There was nothing of which I was more convinced at the Federal Convention than of that fact'[38]—followed by Hear! Hear! from Deakin. But this was as far as he would agree to go; it did not follow from the concession of equal representation that the Senate should possess precisely co-ordinate powers. To demand this was, in Isaacs' words, to 'ask for a shield and . . . strive to obtain a sword'.[39] Specifically he opposed the grant of power to the Senate to amend money bills; the financial superiority of the lower House was essential to responsible government, and any other arrangement was plainly unjust.

> To say that three-fifths of the Senate representing one-fifth of the population of Australia and representing one-fourth of the federal revenue should be able to dominate the remaining four-fifths of the population and the remaining three-fourths of the revenue is absurd.[40]

Section 53 of the constitution, as it finally emerged, restricted the powers of the Senate in dealing with financial legislation. The Senate might not amend or originate money bills, though it could request the House of Representatives to amend them; a difference which one dissatisfied member of the convention described as 'the difference between Tweedledum and Tweedledee'.[41] Isaacs fought a less successful battle to oppose the provision which finally appeared as section 24 of the constitution tying the size of the Senate to one-half the membership of the House of Representatives. His arguments against this prescription were persuasive.

> What connection is there between a House which is avowedly based upon equality of statehood without regard to population, and a House of Representatives elected on the basis of population? We are told that this is the most democratic constitution in the world. Is it to be converted into the most conservative constitution in the world?[42]

It has already been noted that in earlier speeches on federation, Isaacs had been much concerned with the problem of relations

37 ibid, at pp. 544, 661.
38 V.P.D. 20 July 1897.
39 C.D. Adelaide 1897, at p. 174.
40 ibid, at p. 545.
41 Garran: Prosper the Commonwealth, at p. 116.
42 C.D. Melbourne 1898, Vol. 2, at p. 1832.

between the federal Houses. He had much to say on this matter in the convention. He was a vigorous advocate of the referendum as a device for resolution of disputes between the Houses, notwithstanding Bernhard Wise's warning that the referendum had been the weapon of despots from Julius Caesar to Napoleon III. Isaacs proposed a reference to the people if either House refused to pass a bill approved by the other in two successive sessions of parliament, and he considered this to be a much more satisfactory device than a joint sitting of both Houses which he vehemently opposed. The joint sitting, he said, involved the 'fatal step' of introducing the principle of equal representation within the four walls of the House of Representatives, and it made nonsense of the idea of responsible government as the ministry could face defeat at the hands of 'this new creation in the world of politics'[43] which, as he saw it, irrationally mingled the two Houses. In the event, section 57 of the constitution, which was one of the last of the clauses to be finally settled, provided for a simultaneous dissolution of both Houses, to be followed by a subsequent joint sitting, if it was still necessary, to resolve the deadlock. The election which followed the double dissolution was in a sense a substitute for a referendum on the particular question. There have been only two double dissolutions in Australian federal history, one in 1913 and the other in 1951, and the subsequent election has in each case disposed of the issue which had previously caused the deadlock without recourse to a joint sitting.

Isaacs' belief in the referendum was also reflected in his conception of an appropriate procedure for amendment of the constitution. He was critical of the proposal that before an amendment was put to the people it should have to be approved by both Houses; this he said was a 'wrong and unnecessary condition between the proposal and the people's will'.[44] He spoke of the 'loud and frequent complaints concerning the difficulty of altering the constitution' of the United States from which Australia should learn.[45] It was of prime importance to devise a satisfactory and flexible amendment procedure, for this above all was the means of correcting error. 'Let us trust the people.'[46] Isaacs' views ultimately prevailed; section 128 provided for a reference of amendment proposals to the

[43] C.D. Melbourne 1898, Vol. 2, at p. 2182.

[44] C.D. Adelaide 1897, at p. 1022. [45] ibid, at p. 1021.

[46] C.D. Melbourne 1898, Vol. 1, at p. 722.

people; it made provisions for a referendum notwithstanding that one House of the federal parliament did not approve the measure. But the requirements of the referendum procedure have proved a formidable barrier to constitutional change and one may perhaps wonder whether Isaacs with the hindsight of more than sixty years of federation would have retained his faith in the referendum as the central element in the Australian amendment procedure.

Isaacs was naturally much involved in the debate on the composition and functions of the future High Court of Australia. There was general acceptance of the need for a court to umpire the federal system, but delegates differed widely on the staffing of the court and on the extent of the judicial power it should exercise. There were fears that the court would become an arm of the new federal government, and there was a consequent desire to limit its authority. Isaacs opposed proposals to allow only governments to have access to the court to challenge the constitutionality of Commonwealth or State legislation and he was strongly opposed to the view expressed by certain delegates, that the High Court could be staffed by the Chief Justices of the State Supreme Courts as a part-time job. This would save the expense of establishing and maintaining a separate federal judiciary. Isaacs stated the case against this in one of his finest speeches to the convention:

> Economy may be very expensive and in the administration of justice it is altogether too expensive. If there is one moment more than another when a strong Judiciary is needed, in which unbounded confidence is to be placed, such a Judiciary is required for this Commonwealth when the constitution first comes into operation. We are taking infinite trouble to express what we mean in this constitution; but as in America so it will be here, that the makers of the constitution were not merely the conventions who sat, and the states who ratified their conclusions, but the Judges of the Supreme Court. Marshall, Jay, Storey [*sic*] and all the rest of the renowned judges . . . have had just as much to do in shaping it as the men who sat in the original conventions. I therefore think that, at the beginning, we should take the utmost care to establish a Judiciary to effectuate the work we are here preparing.[47]

This was plainly right, though there were some who doubted it and Isaacs was called upon to restate these arguments when the establishment of the High Court was under discussion in the

[47] C.D. Melbourne 1898, Vol. 1, at p. 283.

debate on the Judiciary Bill in the Commonwealth parliament in 1903.[48]

Isaacs also favoured the severe restriction of Privy Council appeals. He made the point that they imposed an unjustifiable burden of expense on the litigant; he called the appeal a 'piece of oppression'[49] and said that victory in such appeals was 'victory by exhaustion. It is the long purse that wins. A man may die, and a generation almost may pass . . . between the outburst of litigation and its final determination.'[50] He dealt sceptically with 'bonds of empire' arguments which were advanced then, as they have been on many occasions since that time, in favour of maintaining the appeal.

> We are bound to the empire by personal and corporate loyalty—loyalty to the traditions, loyalty to the future of the empire of which we are proud to form a part. But I cannot bring myself to believe that the links which bind us to the empire are in any way formed of a lawyer's bill of costs. . . . I ask that we should have confidence in ourselves and in that High Court we hope to establish—confidence not only in its impartiality but also in its ability.[51]

The issue of Privy Council appeals proved to be the principal stumbling block in negotiating the passage of the constitution bill through the United Kingdom parliament in 1900. The United Kingdom government viewed the restriction of Privy Council appeals in the bill as a wanton assault upon the fabric of imperial relations and it was fortified in its opposition by the advice and encouragement of Australian State Chief Justices, including Griffith who, in his 1891 draft of the constitution, had favoured the limitation of Privy Council appeals. A compromise was eventually reached which was expressed in the terms of section 74 of the constitution. Isaacs took no part in the working out of this compromise, though he followed developments as a close observer from the sidelines, as his newspaper-cutting books reveal. They contain a very full selection from the United Kingdom press reporting the crisis and its ultimate resolution.

Isaacs participated actively in the convention debates on other issues. There were protracted discussions involving the regulation of railway rates and the use of river waters. The railway question,

[48] see p. 84 below.

[49] C.D. Melbourne 1898, Vol. 2, at p. 2316.

[50] ibid, at p. 2317.

[51] ibid, at pp. 2315, 2317-18.

to which Isaacs gave some attention in the course of his final speech to the convention, found Victoria and New South Wales in conflict particularly over the Riverina trade.

The interests of the Victorian railways also provoked an unsuccessful intervention by Isaacs in committee in Melbourne to secure an amendment to the clause which finally emerged as section 92 of the constitution. Isaacs had first raised objections to the looseness of the drafting of the clause at Adelaide in 1897.[52] When debate was resumed on it at Melbourne in 1898, the clause provided that 'trade and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free'. Isaacs proposed to add the words 'from taxation or restriction'. His argument was that, as it stood, the clause 'is open to the very serious objection that, while it says "absolutely free", it does not say free of what'.[53] When asked what he meant by the word 'restriction' in his amendment he answered 'any restrictions on entry into a colony of persons or goods'.[54] Isaacs argued that unless the language was qualified, the right of Victoria to grant preferential railway rates for Riverina produce might be affected, while New South Wales rates in relation to the Riverina (being wholly intrastate) would not be subject to control. Isaacs had some support from Deakin, but Barton and Reid, particularly, rejected the point, arguing that the clause as it stood did not affect Victoria's right to deal with Riverina railway rates. It was in this debate that Reid made his celebrated comment on the clause as it then stood and as it was to stay:

> although the words of the clause are certainly not the words that you meet with in Acts of Parliament as a general rule, they have this recommendation, that they strike exactly the notes which we want to strike in this constitution. And they have also the further recommendation that no legal technicalities can be built upon them in order to restrict their operation. It is a little bit of laymen's language which comes in here very well.[55]

In the discussions on Commonwealth legislative powers, Isaacs spoke frequently. He supported Higgins' proposal to include an arbitration power, the clause which became section 51 (xxxv) of the constitution and authorized legislation with respect to conciliation

[52] C.D. Adelaide 1897, at p. 1141.

[53] C.D. Melbourne 1898, Vol. 2, at p. 2365.

[54] ibid, at p. 2366.

[55] ibid, at p. 2367.

and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. 'Its tendency,' he said, 'will be in the direction of peace, and to quieten fears and give confidence in the calm and easy working of the trade and commerce provision of the federal constitution.'[56] That clause was accepted by a very small majority vote and neither its sponsor Higgins nor Isaacs nor anybody else then foresaw its future scope. Isaacs also supported a grant of power to the Commonwealth to legislate with respect to invalid and old age pensions; such a provision harmonized well with his political and social outlook.

Isaacs also took a part, but not a major part, in the debates on the financial arrangements of the federation. They were complex, and as Garran wrote:

> The greatest trouble of all was over federal and State finance. The States were giving up all their customs and excise revenues. The federal tariff was an unknown quantity, but whatever it might be the Commonwealth would at the outset have far too much revenue, and the States far too little; some of it must be returned to the States. But how much should the Commonwealth raise? How much should it be obliged to return? And on what basis of apportionment? Here were questions that not only vitally affected the budget of each State, but raised the stormy question of free trade versus protection. All sorts of hard and fast formulas were tried and found wanting, owing to the impossibility of forecasting the future. With many misgivings formulas were agreed on for the first ten years; after that the only possible way was to trust the Federal Parliament.[57]

Isaacs with some prescience told the Victorian Legislative Assembly after the Adelaide session of the convention that 'anyone who can solve the financial problem of federation will not only win for himself a crown of laurel but absolute immortality'.[58] Finance was not his field, and for the most part he left it to others, including his chief, Turner, though he followed the debates very closely and often interjected to elicit information and views from the speakers.

It fell to Isaacs to speak on behalf of Victoria at the concluding session of the convention in Melbourne on 17 March 1898. Turner was ill and could not be present. Isaacs said that he considered

[56] C.D. Melbourne 1898, Vol. 1, at p. 189.
[57] Prosper the Commonwealth, at p. 119.
[58] V.P.D. 20 July 1897.

the constitution bill a substantial advance on the earlier draft of 1891. But there were various grounds for dissatisfaction: he was not satisfied with the tying of the size of the Senate to the House of Representatives; the deadlock provisions, as they then stood, impaired the operation of responsible government; Victoria was under-represented in the House of Representatives. Too much had been conceded to the smaller States at the expense of the larger. He expressed dissatisfaction with the railway regulation provisions. He believed that the referendum had not been given its proper place in the bill. He read to the convention a message from Turner who said that he was not wholly satisfied with the bill and that he proposed after the lapse of a fortnight to consider the whole question and if he could then do so with justice to Victoria, he would recommend the people to accept the constitution. Isaacs endorsed this statement and stressed the desirability of taking a calm, cautious and careful look at the bill.

> This bill, if accepted, will lead us, to a large extent, upon an unknown track. Is it too much to ask that we shall endeavour to throw all possible light upon the yet untrodden path we are about to traverse? Is it too much to ask that the light that we seek to get in this great enterprise shall not be a mere momentary flashlight, gaudily coloured, it may be, but shall, so far as we can secure it, be the purer and clearer search-light of our intelligence and calmer judgment . . .? For myself, I say there is no dearer hope of my heart than to see a federated Australia; and, in the ultimate result, while approaching this matter with an unshakable determination to do my duty to the people who sent me here, as well as to myself, I do earnestly trust we may find, after all the investigation and care we shall have given to the matter, that our duty is so irrevocably linked with our desire, that we may be able to offer our strongest advice to the people of Victoria to accept this constitution.[59]

In *The Federal Story*, Deakin dealt at length with the coolness of Isaacs and the Victorian ministry to the bill. Deakin was a dedicated federalist who fought with vigour and eloquence for the adoption of the bill. The powerful *Age*, which was a major source of support for the Turner ministry, had many doubts about the bill which it expressed on various occasions before the convention concluded its sessions. According to Deakin, it feared the impact of intercolonial free trade on the fortunes of Victorian primary

[59] C.D. Melbourne 1898, Vol. 2, at pp. 2492-3.

producers; as a long-time advocate of protection it viewed with some apprehension a Commonwealth tariff policy as yet undeclared; it was critical of various aspects of the bill which were also criticized by Isaacs in his closing speech.

> One real source of their dread [says Deakin] was the apprehension that the paper would lose in the Commonwealth the immense influence it possessed in Victoria and preferred to reign in the State rather than be but a powerful factor in the Commonwealth.[60]

So like Milton's Lucifer it went into opposition. Deakin's view was that the hostility of the *Age* was decisive with Turner who otherwise had no particular enthusiasm for or against federation, but that Isaacs' position was more complex. Isaacs, he says:

> exercised no small influence in pressing the *Age* itself into antagonism to the bill. He had not forgotten the manner in which he had been publicly and privately humiliated in Adelaide and could not overlook the fact that in all the sittings his amendments and criticisms were received with scant consideration, unless they commended themselves to the drafting committee. He was a strong-willed as well as a self-willed man, who under his exterior of calmness keenly felt these indignities, especially those to which he was subjected in Melbourne under the eyes of their parliamentary supporters and consequently, loyal as he was to his leader, did not shrink from using the paper against him as well as against his opponents in the convention. They resented this deeply but could not cope with him in strategy. In the *Age* he stiffened the determination to attack the bill, supplying their article writers and reporters with all the points that could be urged against it, while in the cabinet he again employed all his arts of special pleading, threats and his untiring energy to carry his colleagues by the same road. . . . The closing days of the session therefore saw not only incomparably the most powerful paper in Victoria but also the ministry and the three official delegates of the convention together with Higgins and the labour and radical wing, definitely determined to defeat the bill. Isaacs openly stated to Graham and other country members that they intended to declare against it and that it was thoroughly unacceptable to the colony.[61]

Deakin's unrevised manuscript would have been the better for a further look at the scattered and somewhat confusing references to Isaacs. The overall impression of Isaacs which comes through is of a man who, despite great ability and self-restraint and other talents,

[60] The Federal Story, at p. 92. [61] ibid, at p. 94.

was bitterly resentful of the treatment which had been meted out to him at the convention.

A story told at the time which reflects on the closeness of the relationship between Isaacs and the *Age* is that on one occasion when Isaacs was speaking at the Melbourne session in 1898, Sir John Downer scribbled a rhyming note which he passed to one of his colleagues:

> It's said of one who wrote in ancient rhyme:
> He wrote not for his age but for all time.
> But let this line be writ on Isaacs' page:
> He speaks not for all time but for *The Age*.

On 15 March 1898, a few days before the close of the convention, Isaacs spoke on the bill at the A.N.A. banquet at Bendigo. The association had committed itself to federation and to the bill and Isaacs' lengthy detailed and non-committal speech had a hostile reception. On behalf of the ministry he said that the government should not be required to make up its mind about the bill, because its bearing on Victorian interests could not be comprehensively considered until the draft was complete. J. L. Purves, a leading member of the Victorian Bar and a federalist, interjected to demand from Isaacs a clear answer to the question whether he was for or against the bill. Isaacs returned the somewhat delphic answer that his actions during the convention were a sufficient index of his desire for union. As he said:

> Yet it was the duty of the government not blindly to reject or accept the bill, but they should rather obtain all possible information as to its practical working and submit this to the people so that votes may be given with knowledge.[62]

This was the occasion of a brilliant speech by Deakin in support of the bill. Bernhard Wise, a New South Wales delegate to the convention, in his subsequent history of the events, spoke of that speech as the turning point in the Victorian campaign for the bill.[63] This may be an overstatement, but there can be little doubt of the historic and psychological importance of the occasion.[64] Garran

[62] Quoted Bernhard Wise: The Making of the Australian Commonwealth (Longmans 1913) at p. 338.

[63] ibid, at p. 338.

[64] La Nauze: Alfred Deakin Vol. 1, at p. 174.

said that it placed 'Victoria's acceptance beyond the shadow of a doubt'.[65]

On 17 March Garran wrote that:

> Turner is ill and Isaacs won't announce himself, but after the doing he got at Bendigo the other evening and the enthusiastic verdict of the A.N.A., I do not think that he or Turner, or the *Age* either, will risk opposing the bill. The *Age* has been curiously silent for a couple of days. But the general opinion is that it will see the error of its ways and turn round in time.[66]

The course that the *Age* subsequently followed was uncertain; it began to waver and when on 13 April Turner spoke carefully but unmistakably in support of the bill, the *Age* also somewhat carefully came around, although there were still doubts and qualifications.[67] Several factors led to this change of heart on the part of the government and the paper: a group of young members of the Victorian parliament worked hard on the ministry and particularly on men like Peacock who, according to Deakin, had unhappily succumbed to Isaacs' pressure. Trenwith, the only Labour member of the Victorian delegation, had in the closing days of the convention declared for the bill, and Deakin himself worked untiringly and unceasingly for its success.

Isaacs went with the ministry when it changed course, and in the referendum campaign in Victoria, he spoke forcefully and enthusiastically in support of the measure. On 30 May 1898, four days before the Victorian poll, he joined the other Victorian delegates, with the exception of Higgins, in a manifesto to the electors of Victoria:

> At this supreme moment, when you are called to the highest duty of citizenship—the determination of your country's future—we appeal to your wisdom and your patriotism.

[65] Prosper the Commonwealth, at p. 113.

[66] ibid, at p. 122.

[67] See La Nauze: Alfred Deakin Vol. 1, at pp. 176-7. Deakin: The Federal Story, at p. 97 writes: 'The *Age* suddenly wavered and, feeling the tide of public opinion running strongly against it, almost in spite of itself retracted some of its censures and while sneering at the patriotic enthusiasm of the young members of the Australian Natives Association went so far as to admit that from a democratic point of view there was after all nothing to censure in the bill. Its fault was that it was a bad bargain for Victoria and not just to vested interests. After this the paper lapsed into sulky silence, endeavoured to pose as impartial while finding all possible fault with the measure and at last gave a qualified dilatory and half-hearted declaration of acceptance of the bill. The ministry felt that the current was running from them, formally adopted the bill and stepped among its warmest supporters and headed the battle on its behalf.'

> The duty now demanded of you none can avoid without dishonour.
>
> The issue is clear—the result momentous. Shall Australian Union be consummated now and for ever?
>
> The constitution which will weld our future has been framed by friendly hands, and awaits but the breath of approval to take on living force.
>
> Its acceptance will inaugurate union, establish permanent friendship, strengthen democracy, hasten progress, and assure prosperity.
>
> Its rejection will continue isolation and estrangement, retain barriers, encourage strife, prolong Conservatism and fetter industry.
>
> When shall we be more ready for union?
>
> When will our difficulties be less?
>
> When will the hearts of Australians be closer to one another than now? Wisdom dictates acceptance for yourselves and your children. Patriotism demands it for your country and for the Empire.[68]

In addition autograph facsimiles of statements by leading men were published. Isaacs' statement, written in a strong hand, read: 'Every vote for the Bill is a brick that will help to raise the edifice of the Nation.' That was in characteristic style and read very differently from his cautious and doubting utterances almost three months earlier. Higgins, alone of the delegates, did not support the bill: he regarded it as too rigid and undemocratic, and said that it gave too much power to minorities.

The bill was carried by a large majority in Victoria, by 100,520 to 22,009. In New South Wales, the bill, though it secured a majority, failed to win the majority stipulated by New South Wales legislation. There followed further political manoeuvres: Reid called for a Premiers' Conference which met at Melbourne in January 1899, and was on this occasion also attended by Queensland. A number of modifications to the convention bill were agreed; the provision for the resolution of deadlocks was liberalized as was the constitutional procedure for amendment of the constitution, for it was now provided that a vote of one House, and not necessarily of both, might be followed by reference of the amendment proposal to the people at a referendum. Both modifications were, in Isaacs' eyes, improvements. In June 1899 the bill, incorporating the amendments agreed at the Premiers' Conference, was approved at a referendum in New South Wales, and on this second submission there

[68] The Weekly Times, 4 June 1898.

were greatly increased majorities in Victoria, South Australia and Tasmania. In Queensland, in September, the bill was carried by a fairly narrow majority. Western Australia delayed its decision and the vote there, which was not taken until September 1900, favoured federation.

The federation programme now called for the submission of the bill to the Queen for enactment as an Act of the United Kingdom parliament. Towards the end of 1899 the Turner ministry fell, and Allan McLean became Premier of Victoria. McLean had been an opponent of federation, but he accepted the verdict of the electorate. When Joseph Chamberlain, the Secretary of State for the Colonies, asked for an Australian delegation to be sent to England to be on hand during the debate on the bill in the United Kingdom parliament, McLean named Deakin as the Victorian representative.

Deakin writes that he made various alternative proposals to McLean, one of which was that the Victorian nominee should be Isaacs, who was then on his way to England to appear in the Privy Council. 'The latter would be an economical appointment for the government and involve Isaacs in no loss, while to him acceptance meant the sacrifice of half a year's professional income at least.'[69] But McLean made it clear that it was his wish that Deakin, pre-eminent in the federal movement in Victoria, should go, and Deakin accepted.

Isaacs, for the time being a private member of the Victorian Assembly, was in England in 1900 and he watched the developments there with close interest. He was present at a State Dinner given by Chamberlain for the delegates at the Colonial Office late in May, and the Australian press reported that Mr and Mrs Isaacs were enjoying unbounded hospitality, and Mrs Isaacs was presented to Queen Victoria at the May drawing-rooms. Isaacs was honoured at a dinner of the distinguished Anglo-Jewish Society, the Maccabeans, which was presided over by Rufus Isaacs, Q.C., later Marquess of Reading. Rufus Isaacs spoke warmly of the guest of honour as a notable figure at the Australian Bar, in politics and in the federal convention, and Isaacs in reply spoke in his usual style of the relations between the colonies and the Empire. In the midst of a multitude of ceremonies and social occasions, the business of securing the passage of the constitution bill went on, and when at

[69] The Federal Story, at p. 110.

last agreement was reached on the outstanding matter of the Privy Council appeal, Deakin recounts, in a celebrated passage, that the delegates 'seized each others' hands and danced hand in hand in a ring around the centre of the room to express their jubilation'.[70] Soon afterwards, the legal apparatus of Australian federation was complete.

[70] The Federal Story, at p. 162.

5

Federal Politics: 1901-1906

THE FIRST ELECTIONS to the Commonwealth parliament were held at the end of March 1901, and Isaacs was elected to the House of Representatives as member for Indi. This constituency was in the north-east of Victoria; as its boundaries were then drawn it included Beechworth, Bright, Chiltern, Wangaratta, Wodonga and Yackandandah. It was an area familiar to Isaacs from the days of his youth and State politics, and it overlapped the boundaries of the State electorate of Bogong.

Isaacs had not been included in the first federal ministry which was formed by Edmund Barton in advance of the elections to the parliament. Barton formed his ministry after Sir William Lyne had failed in the attempt and had returned his commission. The story of the commissioning of Lyne by Lord Hopetoun, the first Governor-General, is curious, and has been told in detail elsewhere.[1] Lyne had not been a supporter of federation, while Barton was the acknowledged leader of the federal movement. In a moment of despondency, when Lyne was attempting to recruit a ministerial team, Deakin had written to Barton that Lyne could have Isaacs for the asking.[2] Whether this was so was not to be revealed, for Lyne gave up the attempt, and when Barton formed his 'Cabinet of Kings', the two Victorian members were Deakin as Attorney-General, and Turner as Treasurer. Lyne, a New South Welshman, was included as Minister for Home Affairs.

Party attitudes were not clear. As Sawer points out, since the initiation of responsible government in the States, there had been cross-divisions on tariff, education, land settlement policy and other issues.

> In Victoria and South Australia, fiscal protectionism had been associated chiefly with political radicalism. In the other States, particu-

[1] See La Nauze: The Hopetoun Blunder (Melbourne University Press 1957).
[2] ibid, at p. 22.

larly in New South Wales, radicalism had more usually been associated with free trade beliefs, but at the turn of the century some protectionists had also sought radical support. The regional distribution of these views also differed from State to State. . . . Personalities rather than principles often influenced party groupings.[3]

A factor of growing importance was the birth of the Labour party which began to spread in the last decade of the nineteenth century, and by 1901 was formally established in New South Wales, Victoria, Queensland and South Australia and soon after in the other States. In its earliest days, the Labour party supported radical objectives, but on the issue of the tariff and protection it was divided and its members voted according to individual conviction.

In his election speeches, Isaacs aligned himself with the Barton Liberal protectionist group against the Reid free-traders. Barton had announced his policies at West Maitland, New South Wales, in mid January 1901. On more controversial issues, he had spoken in favour, though without great enthusiasm, of female suffrage; he supported a uniform federal system of old age pensions when the financial position became clearer; he announced the government's intention to provide for a federal conciliation and arbitration system, though he anticipated and hoped—with little justification as events were to show—that there would be little need for its employment. On the major issue of tariff, Barton was cautious; he said that it was desired to avoid direct taxation by the Commonwealth, so that revenues for Commonwealth expenditure and for return to the States under section 87 of the constitution[4] must come from customs and excise receipts. This meant that they must be substantial, but not so heavy as to dry up revenue. He also said that the duties imposed would provide protection for industries which needed shelter.

In Isaacs' electorate of Indi, mining and mixed farming were the main occupations. In the towns there were small industrial enterprises including flour mills, butter and cheese factories, tan-

[3] Australian Federal Politics and Law 1901-1929 (Melbourne University Press 1956) at p. 14.

[4] The so-called 'Braddon blot'. 'During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure. The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.'

neries and wool scouring works, and Wangaratta was already an important railway town with workshops and rail sheds. In Victoria support for protection was strongest in the urban areas and weakest in the country, and it is not surprising therefore that Isaacs' opponent should have been a free-trader, Thomas R. Ashworth, president of the Free Trade Association of Victoria. The campaign produced a flood of oratory which was reported at length in the local presses. The *Ovens and Murray Advertiser* for 23 March 1901 reported Isaacs' speech at Yackandandah to a 'fairly large and enthusiastic' audience. Isaacs dwelt on his personal links with Yackandandah; he reminded the audience that he had had the 'undying felicity' of participating in the work of federal constitution-making and had been in the House of Lords when the Commonwealth of Australia Constitution Bill was finally passed into law. He drew attention to the novel aspects of this election, and of the tasks of the parliament and government which would follow it. They must provide for the transfer of State departments and for the establishment of courts. The Commonwealth public service, he said, must be organized and there were important matters touching defence, alien legislation and White Australia which must be dealt with immediately.

The tariff issue had to be faced, and Isaacs, like Barton, dealt with it somewhat cautiously. He pointed to the need to raise a revenue without imposing a direct tax burden; he stressed the importance and desirability of a measure of protection for Australian industries to allow for growth and a reasonable wage structure; he asserted that the burden, in terms of increased costs and prices, was not and would not be heavy.

Isaacs had a decisive victory with a vote of 3888 to his opponent's 2061. It was the last election he had to fight, for he was returned unopposed to the second federal parliament in December 1903, and he resigned in October 1906, on his appointment to the High Court, shortly before that parliament came to an end.

In the first parliament, Barton's Liberal protectionists were the single largest party, though as a single group they did not command a majority in the House of Representatives.[5] The opposition was

[5] On Sawer's count, the Barton group had 32 seats, the Reid Free-Trade Conservative group 27 and the Labour party 16 seats in the House of Representatives: Australian Federal Politics and Law 1901-1929, at p. 18. Crisp: The Australian Federal Labor Party 1901-1951 (Longmans 1955) at p. 155 puts the figures at 34, 25 and 16 respectively. In the Senate, the Barton group had 11 seats, the Reid group 17 and Labour 8.

led by George Reid. Labour, led by J. C. Watson, was a force from the beginning, with 16 seats in the House of Representatives and 8 in the Senate, and its support was sought, particularly by Barton. Labour was prepared to 'auction' its support in return for concessions, whether in the shape of legislation or the dropping of proposals to which it was strongly opposed.[6]

The parliament was ceremonially opened at the Melbourne Exhibition Building on 9 May 1901, and Isaacs, as a member, took part in the ceremonies. A contemporary record describes the scene.

> The proceedings were opened by appropriate prayers, offered up with reverential seriousness by the Governor-General, preceded by the Old Hundredth Psalm. Then the King's proclamation was read by Mr Blackmore, the Clerk of the Parliament, and the Duke of Cornwall and York delivered the opening speech in a clear and resonant voice, and concluded by declaring in the name and on behalf of his Royal father, that the Parliament of the Commonwealth was now duly opened; a flourish of trumpets and a Royal salute fired outside emphasizing the announcement. . . .
>
> . . . The Governor-General proceeded to administer to the members the oath of allegiance prescribed by the Commonwealth Constitution Act, and they were invited to retire and choose their President and Speaker respectively, after which the 'Hallelujah Chorus' and 'Rule Britannia' were played by the orchestra, and sung by the leading vocalists of Mr Musgrove's opera company, and then the Duke and Duchess, after bowing to the large assemblage, retired amidst another burst of cheering, and the imposing pageant was brought to a close.[7]

The Duke of Cornwall and York later became King George V and was to play a very active role in the events which, almost thirty years later, culminated in Isaacs' appointment as Governor-General of the Commonwealth. And the bible on which Isaacs was sworn in as a member of the House of Representatives, and which was presented to him as a memento of the occasion, was used again when he was sworn in as Governor-General in January 1931.

When the many ceremonies associated with the inauguration of federation and the federal parliament were concluded, the new government and parliament proceeded to more practical duties. Throughout Isaacs' career in federal politics, the headquarters of the federal government were in Melbourne. This was provided

[6] Crisp: op. cit., at p. 155.

[7] James Smith: The Cyclopedia of Victoria (1904) at p. 97.

for by section 125 of the constitution,[8] so far as the parliament was concerned, until such time as the seat of government was fixed in accordance with that section. During Isaacs' time in the parliament there was debate and some difference of view on the siting of the seat of government, and the parliament did not sit in Canberra until 1927. From 1901 until that time, the federal parliament sat in the elaborate Victorian Parliament House in Spring Street which was physically imposing, if not, in the early days anyway, well equipped to provide for the comfort of members.[9]

Isaacs' first interventions in debate in the House of Representatives were on lawyer's points. He raised questions on the drafting of the Acts Interpretation Bill and the Public Service Bill, and while he spoke on points of substance, he was mainly concerned with drafting matters. In June he was appointed to the parliamentary Library Committee. In July he spoke on various matters arising out of the Customs Bill, and commended the drafting which bore the distinctive imprint of the minister, C. C. Kingston of South Australia.

In that month he also spoke at length in support of a motion to establish a Commonwealth Department of Agriculture and Productive Industries. Shortly after his return from a visit abroad in 1900, Isaacs had contributed articles on the New Agriculture to the Melbourne *Leader* and these had been reprinted as a booklet by direction of the Victorian Minister of Agriculture. In this, with a considerable apparatus of learning and in characteristic style, he wrote of the importance of agricultural research and the dissemination of the results of such research to farmers. He reviewed the work being done by government in the United States and Canada in these fields, and urged that note should be taken of these matters in Victoria. In the debate in the House he traversed much of the same ground, though he now stressed the importance of federal action. He observed that in the United States the federal government had amply used its powers in such a way as

[8] 'The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney. Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown land shall be granted to the Commonwealth without any payment therefor. The Parliament shall sit at Melbourne until it meets at the seat of Government.'

[9] La Nauze: Alfred Deakin Vol. 1, at p. 236.

to avoid trespass into the area of State powers. In this context he made reference to the appropriation power in the Commonwealth constitution and suggested that the Commonwealth might make grants to the States to encourage research and agricultural development.

The first major policy issue introduced into the parliament by the Barton administration was immigration control. This was dealt with in two measures, the Immigration Restriction Act and the Pacific Island Labourers Act. Isaacs had made his views quite clear during the election campaign, and support for White Australia was general and was carried over from colonial days. The majority of Asian migrants into Australia in the colonial days had been Chinese, and there were smaller numbers of Indians, Afghans and Japanese. Asian migration was seen as a threat to living standards, but there is little doubt that elements of racial prejudice also existed. Isaacs spoke in the debate on the second reading of the Immigration Restriction Bill in September 1901.

> I entirely agree . . . that there is no measure which has yet been placed before us or which I think could be placed before us that possesses more vital interest for us in regard to our immediate surroundings, or is of greater import with regard to Imperial relations or more lasting concern to the future of the Commonwealth than the present measure. . . . I am prepared to do all that is necessary to insure that Australia shall be white and that we shall be free for all time from the contaminating and degrading influence of inferior races. There is one way to do it, and if we were free to regard the matter from the one standpoint of Australia . . . I should not hesitate to do in this regard what seems to me the clear, short, decisive act of expressing in unmistakable terms what we mean to effect. In doing that I would simply follow the line that nature herself has drawn, that nature herself has painted in ineffaceable tints, and I would say in so many words that the colour line is the one that shall mark the distinction; the colour line is that which shall bar inferior races from entering Australia.[10]

The words now read crudely: 'I would not suffer any black or tinted man to come in and block progress,'[11] but what he said was well understood and commanded general support at that time. In committee, he commended the Japanese on 'the marvellous and magnificent strides . . . in the path of what we may call Western

[10] Parl. Debs (H.R.) Vol. 4, at p. 4845.

[11] ibid, at p. 4846.

civilization' which they had taken, but said, 'I have no hesitation in expressing my opinion that their admixture with this community would not tend to elevate the tone of this continent, or to dignify the Empire.'[12]

The government proposed to control migration by a dictation test originally in English, but, as amended, in a European language, and this was later, in the context of Scottish Gaelic, to give rise to absurd contrivance and, in the High Court, to a nice problem of interpretation.[13] The government proceeded in this way because of the Imperial government's opposition to an exclusion test based specifically and directly on race or colour. Joseph Chamberlain at the Imperial Conference of 1897 had said quite clearly that the Imperial government was not concerned with the substantive issues involved in the exclusion of coloured immigrants, but only with the method by which it was secured. An Act directly imposing a colour bar would be offensive to many coloured British subjects.

Watson, the leader of the Labour party, proposed an amendment providing directly for exclusion on ground of colour, and charged that the government's resort to the dictation test was hypocrisy. In the event, the amendment was narrowly defeated; Isaacs voted against it, and for the government's dictation test, which he supported only because of the Imperial government's attitude. It was not until the mid twentieth century that legislation put an end to the sham of the dictation test.

The Pacific Island Labourers Act dealt separately with a special aspect of this general question. It provided for the phased ending of the importation of Kanaka labour to work the sugar-cane fields of Queensland. Isaacs strongly supported the measure; the maintenance of a servile population, he said, was not compatible with the continuance of free political institutions.

> I think that if we have any regard for the welfare of these unfortunate beings—these inferior beings who are dragged, so to speak, at the chariot wheels of our progress—we ought, out of consideration for them alone, to abolish this traffic, and at the earliest moment. . . . I cannot frame any reason in my own mind that would be satisfying to any humane conscience why we should delay as desired the definite, final, and I hope, irrevocable solution of this monstrosity.[14]

[12] ibid, at p. 5128.

[13] *R. v. Wilson; ex parte Kisch* [1934] 52 C.L.R. 234.

[14] Parl. Debs (H.R.) Vol. 5, at p. 6001.

It was inevitable that the tariff question should be a major policy issue in the first session of the parliament. Isaacs spoke, though he did not play a conspicuous role in the debates. He referred to free trade as a 'dying faith' in Australia, and, with copious reference to writings and to statistics, discoursed on the sufferings of working men under régimes of free trade elsewhere. He spoke of the importance of encouraging the growth of secondary industries in Australia.[15]

The organization of the judicature very naturally engaged his full attention. The constitution, in section 71, specifically provided that there should be a federal Supreme Court to be called the High Court of Australia, which was to consist of a Chief Justice and so many other justices, not less than two, as the parliament prescribed. Though the constitution spoke in such peremptory terms, there was opposition within the parliament, and from some leading lawyer members, including H. B. Higgins and P. M. Glynn (who both became Attorneys-General of the Commonwealth and Higgins a justice of the High Court), to the early creation of the High Court. Isaacs, on the other hand, was a strong advocate for its immediate establishment. Deakin took the leading role, as Attorney-General, in fighting for the court. He had sought out the aid of Griffith, still Chief Justice of Queensland, in preparing a draft Judiciary Bill, and Griffith had also produced a draft of a complementary measure, the High Court Procedure Bill.

Deakin introduced the Judiciary Bill, and his speech on the second reading in March 1902 in which he eloquently argued for the immediate establishment of the High Court has been generally acknowledged as one of his finest parliamentary achievements.[16] He stressed the importance of the court's role in constitutional adjudication and interpretation; he rejected suggestions that a 'scratch court' constituted by the Chief Justices of the State Supreme Courts could adequately perform this task.

The bill was not then debated; it was reintroduced in June 1903 and passed into law in August after a difficult and complex debate. The attack was led by Higgins and Glynn; it was said that while the constitution provided for a High Court, it did not prescribe a time at which it must be established. It was said that the Supreme Courts of the States, and the Judicial Committee of the Privy Council on appeal, could adequately discharge the role contem-

[15] ibid, at pp. 6353ff.

[16] See La Nauze: Alfred Deakin Vol. 1, at pp. 287ff.

plated for the High Court. Isaacs and Barton strongly supported Deakin. The High Court, Isaacs said,

> is the court that is to stand as the authoritative expositor and arbiter as to the meaning of the constitution and of the laws made under it, and, as I shall show, it will practically be the final expositor and arbiter of the constitution and the laws. It is intended as one of the constitutional checks and balances. It stands as a touchstone with which to test and try the validity of our legislative acts. We, as the trustees of the people, sitting in this parliament by virtue of the constitution, have no right to say that the creation of the judicial body which is specially designated to watch us, as well as do other important acts in the Commonwealth, shall be delayed, or that it shall not be constituted, or that it shall be replaced by some other tribunal. These are the considerations with which we ought to commence the review of our duties, and I protest that we are not to take into account, at this moment, anything but what is right in order to discharge our obligations as fearless legislators in view of the constitution.[17]

Like Deakin a year earlier, he dwelt on the role of the court.

> It would form, as it was designed to be, the great bulwark of our constitution. . . . It would be so high above political interference as to be free from the faintest breath of suspicion, and yet so close to the common life of our people as to feel the pulse-beat of their daily life. No doubt it would be keenly critical of the verbiage of the enactments which it might be called upon to construe; but it would also be able to interpret them according to the inner purpose and meaning with which they were enacted. The judges would be proud indeed to be members of our glorious Empire, but none the less, and always first, they would be citizens of this great Commonwealth whose rights and liberties it would be their special charge and privilege to cherish and preserve.[18]

In committee, he dealt with the arguments in favour of manning the High Court with the Chief Justices of the States. These judges could be removed by the appropriate State legislatures, while the Commonwealth constitution required that High Court judges should hold office for life, subject only to the removal provisions in section 72. This view of the constitutional requirement of tenure for High Court and other federal judges was subsequently affirmed

[17] Parl. Debs (H.R.) Vol. 13, at pp. 721-2.
[18] ibid, at p. 733.

by Isaacs as a member of the High Court in *Alexander's Case*[19] and is now accepted law. The reasons elaborately stated by Isaacs as a judge in support of this view are not compelling and did not persuade all members of the court in *Alexander's Case*, but in terms of authority he won as a judge the argument which he had first advanced as a parliamentary debater. He argued also that it was inappropriate that State Chief Justices who frequently held appointments as Lieutenant-Governors of their States should hold that office while serving as justices of the High Court. Whether all the individual reasons were compelling, the case for constituting the High Court with State judges was a poor one, and the view which finally prevailed was that the court should be staffed by judges specifically appointed to it.

Even here Deakin had to accept less than he had hoped for. He wanted a court of five judges with appropriate emoluments and pension rights, but he had to accept a court of three with no pension provision. Passion for economy ran high. Isaacs supported Deakin's demand for a court of five and pointed to the wide range of its original and appellate jurisdiction. As a compromise Isaacs proposed four judges, but that was not acceptable. The battle lost at this time was won shortly afterwards. In 1906, as Attorney-General in the second Deakin administration, Isaacs moved the second reading of the Judiciary Bill to increase the membership of the High Court by two additional judges. His argument that the court was overworked was not then challenged—so soon after its hotly contested establishment had the court become an accepted part of the Australian polity.

In the committee debates, Isaacs supported the view that the High Court, in this respect unlike the Supreme Court of the United States, should sit in all capital cities. He put it that:

> if the whole of Australia is to bear the expense connected with the High Court, I think that it should be understood that the High Court is to sit in each capital at some time or other, if required.[20]

Higgins had some doubt about this; he foresaw unnecessary travel and delay in the disposition of cases if the court were required to travel throughout Australia. Isaacs' view prevailed, and it may well be that the presence of the court in the various State capital

[19] *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd* (1918) 25 C.L.R. 434.

[20] Parl. Debs (H.R.) Vol. 14, at p. 1443.

cities has served to emphasize its national role and significance. In any event, and in this respect unlike the Supreme Court of the United States, it is a *general* court of appeal, spending much of its time and energy on appeals on matters of State law, and it is well, within the limits of reasonable convenience, that it should sit from time to time in all States from whence its business comes. Perhaps the oddity is that the court does not sit regularly at the seat of government, and that its principal registry so far remains in Melbourne.

The role of the Privy Council was discussed in various contexts in debate and in committee. Isaacs, though an ardent imperialist, was selective in his praise of imperial institutions. He had known the Judicial Committee as an advocate appearing before it. 'It is,' he said in the debate on the Judiciary Bill, 'a venerable body and it sits in a somewhat dingy den in Downing Street.'[21] This handsome exercise in alliteration was supported by an argument, often repeated since then, that the English judges who sat on Privy Council appeals did not have intimate knowledge or experience of Australian matters and particularly of Australian constitutional law, and that it was therefore doubtful whether it was a court in which the fullest confidence could be reposed. Isaacs' advocacy perhaps carried him too far when he suggested in debate that the members of the Judicial Committee were 'as unable to interpret the meaning of our statutes as if they were living in the planet Mars'.[22]

Other and more technical matters in the Judiciary Bill were fully discussed in committee: among them the investment of the High Court with matters of original jurisdiction by section 76 of the constitution, and the definition of the exclusive jurisdiction of the High Court and the investment of State courts with federal jurisdiction by section 77. In this technical discussion, Isaacs excelled: there was certainly no lawyer in the parliament who was his master.

Shortly after the passage of the Judiciary Act, the first appointments to the High Court were made. Griffith was named as Chief Justice and Barton and O'Connor as associate justices. Deakin had strongly supported the appointment of Griffith, and he had been in correspondence with him even before the Judiciary Bill was finally passed, and had secured from him a statement of his willingness to accept the office. O'Connor, who had served as minister without portfolio, had hoped for an appointment to the court, and

[21] Parl. Debs (H.R.) Vol. 13, at p. 731.
[22] ibid, at p. 732.

was generally favoured as an appropriate appointee. The nomination to the third seat was less certain. Barton wished to retire from active political life and there were indications that he would welcome appointment to the High Court Bench. But the matter was complicated and, late in August, Deakin inquired of Inglis Clark of Tasmania who was then a member of the Tasmanian Supreme Court whether he would accept a seat on the High Court Bench if it were offered to him, and Clark replied affirmatively. An offer was not made to him and Barton and O'Connor resigned their political offices, and were appointed to the court towards the end of September 1903.[23]

Deakin succeeded Barton as Prime Minister. In the cabinet reshuffle Senator J. G. Drake was appointed Attorney-General. As La Nauze observes, Drake:

> was hardly eminent in the law. Behind Deakin sat two of the most formidable legal men in Australia, Isaacs and Higgins; but Queensland's representation in the cabinet, and Drake's painstaking services, could not be sacrificed simply to secure a competent Attorney-General.[24]

Higgins, though not a Labour man, became Attorney-General in the Watson Labour government which was formed in April 1904, during the second parliament, when Deakin resigned on the adoption of an amendment to the Conciliation and Arbitration Bill, extending its provision to State employees. Isaacs did not become Attorney-General until Deakin became Prime Minister for a second time in July 1905.

The debate on the Conciliation and Arbitration Bill began in July 1903, while Barton was still Prime Minister. It was introduced by Deakin, and Isaacs spoke at length late in August. He said that he had supported provision for industrial conciliation and arbitration from his earliest days in the Victorian parliament, and that he had supported Higgins' advocacy of a Commonwealth conciliation and arbitration power in the Federal Convention of 1897-8. It was clear that a stage had been reached at which disputes between capital and labour could be 'injurious to the whole body politic'.[25] It was unfair to stress by way of criticism the element of *compulsion* in the legislation.

[23] The story is told in detail by La Nauze, Alfred Deakin Vol. 1, at pp. 305ff.
[24] ibid, at p. 314.
[25] Parl. Debs (H.R.) Vol. 16, at p. 4267.

> This bill simply bids the waves of passion, prejudice, and partisanship to be still. It evolves order out of chaos. It is a national proclamation of peace. With equal voice to all, it commands that none shall ever lay down the implement of labour and take up the weapons of war, and it tells all—whether employers or employed—to bring, if need be, their mutual controversies and estrangements to the national judgment seat for pacification and final appeal.[26]

Of course there is more to the issue of compulsion than this rather florid utterance discloses. As subsequent industrial history shows, the power of the law to resolve industrial disputes in which passions run high is limited, and there has been bitter and angry resentment at penal clauses inserted to compel obedience to or at least to punish disobedience to arbitral awards. But a compulsive arbitral process is now a long-established institution of our national life.

From its earliest days, the Conciliation and Arbitration Bill gave rise to sharp dispute. Kingston resigned from the ministry because of the government's refusal to extend its provisions to all seamen engaged in the coastal trade. Then dispute arose over the clause which provided that the bill should not apply to the public servants of the Commonwealth or a State or any public authority constituted under the Commonwealth or a State. Andrew Fisher, arguing particularly in the context of the State railway servants, put the Labour position in terms that:

> If . . . the States enter into competition with private employers in various industries, they should be prepared to subject themselves to the same rule that governs private employers regarding conditions of employment.[27]

Isaacs, like Deakin, opposed the Labour position.

> I fear that honourable members have lost sight of a very important principle and one that, perhaps, is best expressed in the phrase of a Chief Justice of the United States, who spoke of 'an indestructible union of indestructible States'. When we interfere with the rights of the States to fix their own terms of employment for their employés, we are invading what is really and properly the province of the State Parliaments.[28]

In September 1903, an amendment moved by Fisher to extend the bill to public servants was defeated on a close vote, though a

[26] ibid, at p. 4268.

[27] ibid, at p. 4751.

[28] ibid, at p. 4773.

subsequent Labour amendment to extend it to railway servants was carried. Then, for the time being and over angry protest, the bill was dropped by the government.

Deakin reintroduced the bill in the second parliament in March 1904. It excluded the State public services and instrumentalities, and Labour once again attacked on this ground. Isaacs restated the policy views he had last expressed six months earlier, though he did not commit himself on the constitutional question. That, he said, was for the court. Deakin by this time had moved to the view that the extension of the legislation to the States was unconstitutional and Isaacs expressly dissociated himself from that definite position, contenting himself with opposition in principle to the Labour amendment to include State employees.

> I decline to be one to pass a vote of no confidence upon the State in which I was born...The amendment involves the tearing up of every Act of the Victorian Legislature relating to the Public Service and to the railway service. Why should it be left to the federal judge to disregard everything that the Victorian parliament has said or may say on the subject of its employés?[29]

The Labour amendment was carried and Deakin, choosing to treat the question as one of confidence, resigned on 22 April 1904.

Watson then formed the first Labour administration which continued in office until mid August 1904. Once again issues arising out of the Conciliation and Arbitration Bill loomed large. Isaacs spoke on a variety of issues: he strongly supported the proposal to authorize the making of a common rule for an industry to bind parties who were not actually involved in the dispute before the tribunal. He argued this as a matter of principle, and supported it in law on the ground that the constitution authorized the making of laws with respect to conciliation and arbitration for the *prevention* of industrial disputes. A common rule, he said, was an exercise in prevention. His subsequent views as a judge were different; in *Whybrow's Case*[30] he was a party to a unanimous decision of the High Court holding that the common rule provisions in the Conciliation and Arbitration Act were invalid. He successfully opposed an amendment which would have denied the right of

[29] Parl. Debs (H.R.) Vol. 18, at pp. 1103-4.

[30] *Australian Boot Trade Employees Federation v. Whybrow & Co. & others* (1910) 11 C.L.R. 311.

recourse to the Arbitration Court to unions whose rules authorized the application of funds to political purposes or required members to do acts of a political character. Isaacs said that the amendment was objectionable because it denied to unions the right to protect their interests by constitutional means, and he characteristically illustrated this point with an account of the history of the struggle of trade unions in England to overcome legal disabilities and to secure through parliamentary representation and action a more effective voice for their claims. Again, he spoke in support of allowing legal representation to parties before the Arbitration Court; he observed that this was particularly important when constitutional issues arose.

The Watson government fell on an issue arising out of the Conciliation and Arbitration Bill: this time it was preference to unionists. The government's proposal for award preferences to unionists was amended to require the approval of a majority of workers in the industry concerned before the court could give preference. The government's view was that this destroyed the value of the preference provision and it moved to recommit the bill to committee for the purpose of dealing with the issue. By a parliamentary manoeuvre, an opposition group had this question debated in the House on the motion to recommit instead of following the more usual course of allowing recommittal and then debating the matter of substance in committee. The object was to secure the vote of the Chairman of Committees which would not have been available as a deliberative vote, had the matter been discussed in committee. The government was caught by surprise and was defeated. It treated the matter as one of confidence, and when Watson's request for a dissolution was refused, resigned.[31]

Isaacs voted with the government on this issue, on which the protectionists were split. He was scornful of the device by which the Watson government had been brought down.

> The Labour government was not fairly treated. They did not receive the fair opportunity which they were promised. They were not faced with a direct motion of want of confidence. They were not defeated upon a motion upon which they were openly challenged and upon which they and their defenders could place before the country their merits. They succumbed to a side thrust.[32]

[31] See Sawer: Australian Federal Politics and Law 1901-1929, at p. 38.

[32] Parl. Debs (H.R.) Vol. 21, at p. 4454.

In October 1904, speaking in support of a motion of no confidence moved by Watson, Isaacs assailed the government, now led by Reid, and repeated his charge that Reid and his supporters had showed no courage in the devices to which they had resorted to bring down the Watson government.

At this stage the protectionists were divided. At the election for the second parliament in December 1903, Labour had gained considerably: in the House of Representatives, the Protectionists had 25 seats, Free-Traders 24, Labour 25, and there was one independent. This was a sharp decline in the strength of the Barton-Deakin group, and brought the Labour party into a position of equality with the other two.[33] This was the parliamentary situation which Deakin likened to a game of cricket in which there were 'three elevens' in the field. In the parliament so constituted, Deakin's first administration fell, then Watson was brought down, then Reid took office and was in turn brought down. Then Deakin formed his second ministry.

Working this out in more detail, Deakin's party split on the motion which brought down the Watson government, and Reid took office with the support of the majority of Deakin's group. The more radical wing of the protectionist group led by Isaacs and Lyne declined to follow the majority of the group and held a joint meeting with the Labour party as a result of which terms of an alliance were drafted and agreed and were made public. These read:

Articles of Alliance

— between —

Liberal-Protectionist & Labour Parties

Conditions of Alliance

1. Each Party to retain its separate identity.
2. Alliance to be for the life of this and the next Parliament.
3. Each Party to use its influence individually and collectively with its organizations and supporters to secure support for, and immunity from opposition to, members of the other Party during the currency of this Alliance.
4. A joint election committee to consider contested seats and make recommendations to both Parties.

[33] The figures are Sawer's: op. cit., at pp. 35-6. Crisp: The Australian Federal Labor Party 1901-1951 varies the party strength slightly: Protectionists 26, Labour 25, Free-Traders 24.

5. Any member of Parliament who agrees to these Articles may subject to the approval of both Parties be admitted to this Alliance.

Joint Platform

1. Conciliation & Arbitration Bill as nearly as possible in accordance with the original Bill as introduced by the Deakin government, but any member is at liberty to adhere to his votes already given.
2. White Australian Legislation: Maintain Acts in their integrity and effectively support their intention by faithful administration.
3. Navigation Bill: Report of Royal Commission to be expedited and subject to this, Bill to provide for:
   (a) The protection of Australian shipping from unfair competition.
   (b) Registration of all coastal vessels engaged in the coastal trade.
   (c) Efficient manning of vessels.
   (d) Proper accommodation for passengers and seamen.
   (e) Proper loading gear and inspection of same.
4. Trade Marks Bill.
5. Fraudulent Marks Bill.
6. High Commissioner Bill: Selection of Commissioner to be subject to prior consent of Parliament: the economizing of existing State Agencies.
   Full utilization of Federal staff for the benefit of all the States.
7. Electoral Bill (amendments).
8. Papua Bill.
9. Anti-trust Legislation.
10. Tobacco Monopoly: Appointment of present Select Committee as a Royal Commission with addition of members from both Houses of Parliament.
11. Iron Bonus Bill—Every member to have freedom of action as to method of control.
12. Standing Committee on Trade, Commerce & Agriculture.
13. Preferential Trade to be discussed by joint parties at an early date.
14. Legislation (including Tariff legislation) shown to be necessary:
   (1) To develop Australia's resources.
   (2) To preserve, encourage and benefit Australian industries, primary and secondary.

(3) To secure fair conditions of labour for all engaged in every form of industrial enterprise, and to advance their interests and well-being without distinction of class or social status.

(4) As to any legislation arising under this paragraph only any member of either Party may as to any specific proposal:
   (a) agree with the members of his own Party to be bound by their joint determination, or
   (b) decide for himself how far the particular circumstances prove necessity, or the extent to which the proposal should be carried.

(5) Royal Commission to be at once appointed to enquire as to the necessary Tariff Legislation. Personnel to be approved by Parliament. Commission to report in sufficient time to enable any desired legislation to be introduced next session.

15. Old Age Pensions on a basis fair and equitable to the several States and to individuals.

16. Quarantine Legislation.

17. Either party may at any time submit to the other Party any other subjects for consideration with a view to joint action.

These terms, in effect, committed the alliance partners to support the protectionist programme; the significant Labour addition was federal legislation for old age pensions.

On Watson's motion of no confidence in the Reid government moved in October 1904, Isaacs spoke at length on the political events which had taken place during the course of the short life of the second parliament. He referred to the division in the ranks of the protectionist-Liberals. His and Lyne's section

> I am proud to say, preserved its identity, although it is true that, standing alone, owing to its small proportions, it was almost absolutely helpless. But we have this consolation—which is fortunate for the country—that we have been able to enter into an alliance honourable, and I believe powerful, and full of possibilities and advantages for the Commonwealth.[34]

He pointed out that the alliance was for a limited term, and had at that time a limited platform. He spoke of the problems which had been encountered in dealing with the Conciliation and Arbitration Bill, 'a bill which seems destined to be the grave of

[34] Parl. Debs (H.R.) Vol. 22, at p. 5451. Sawer: Australian Federal Politics and Law 1901-1929, at pp. 50-1 has some interesting comments on this vote of censure.

ministerial reputations'.[35] He was scornful of charges that the Labour party had been intent on bringing down the Deakin government, even on the issue of the extension of the bill to State employees. It was Deakin who had chosen to make the issue one of confidence, and he in turn gave support to the Watson government. All this made nonsense of the 'socialist bogy' that Labour were 'a dangerous band of political desperadoes, who are only waiting for an opportunity to loot their fellow citizens, and enter upon a career of robbery and confiscation'.[36]

Isaacs then turned to the events leading to the fall of the Watson government which 'soon met their fate upon the Dark Continent of the Conciliation and Arbitration Bill'.[37] They had been brought down by a shabby political manoeuvre, and Isaacs was particularly critical of the support of Deakin and his protectionist group for Reid's manoeuvres. Turning to the Labour party he said:

> I have the utmost faith in the loyalty and honour of the Labour party. . . . We found in the fires of sudden adversity sufficient light to see, and sufficient heat to weld together, certain political points of contact which demonstrate to me—and I think to the whole of Australia—that upon some of the chief ideals of liberal policy there is substantial agreement between our two parties.[38]

As La Nauze says, the factors prompting the alliance of the Isaacs-Lyne group with Labour were various: a genuine sympathy with Labour, a personal hostility to Reid and a hope of immunity from Labour opposition at the next election.[39] As to the hope of immunity, State Labour organizations were unwilling to grant it, for their protectionist-Liberal allies held the seats most vulnerable to Labour attack and there was a very real hope that Labour could make a majority in its own right.[40] La Nauze also says that Isaacs was moved by the *Age*'s fear that protection was now threatened. Item 14 in the Articles of Alliance dealt with this matter, and provided for a Royal Commission to be appointed immediately to inquire into the necessity for tariff legislation. In December 1904 Isaacs spoke in the House on this matter saying that there were defects and anomalies in the tariff, that the situation was urgent, that there was substantial disorganization of trade and consider-

[35] ibid, at p. 5452.
[36] ibid, at p. 5453.
[37] ibid, at p. 5455.
[38] ibid, at p. 5461.
[39] La Nauze: Alfred Deakin Vol. 2, at p. 379.
[40] Crisp: The Australian Federal Labor Party, at pp. 159-60.

able unemployment.[41] Just before the close of the session in December, the government appointed a Royal Commission composed of two free-traders and two protectionists with Sir John Quick, a protectionist, as chairman, to conduct a general inquiry into the working of the tariff.

The Conciliation and Arbitration Bill finally passed into law in this session. The Reid government accepted its extension to State railway employment and to employment in industries carried on by or under the control of the Commonwealth or State or any public authority constituted under the Commonwealth or State. Compromises were reached on a number of issues: agricultural and domestic employees were excluded, a definition of political purposes permitted union contributions to political action designed to secure industrial objectives, and preference could only be given in an award if the Arbitration Court considered that such preference was approved by a majority of those affected by the award who had interests in common with the applicants.

Isaacs constantly pressed his attacks on the government, charging it with lack of direction and with want of principle. He found apt support in quotation, not this time from Shakespeare, but in some notable lines of the lesser known Hosea Biglow:

> Ez to princerples, we glory
> In hevin' nothin' o' the sort.
> We air not protectionists nor free-traders;
> We air just a Ministry in short.[42]

Parliament did not reassemble for more than six months, until the end of June 1905. During this interval there had been political negotiations between various elements: the Labour party, the Isaacs-Lyne group and Deakin. In June 1905 there was support within the Labour party for action to bring down the Reid ministry and to replace it by a coalition made up of Labour and the Isaacs-Lyne wing of the protectionist party, but this was rejected by the parliamentary Labour party, and Watson invited Deakin to take office again, undertaking to give general Labour support.[43] When Reid met the parliament it was clear that the challenge was to come immediately; Deakin moved what was in effect a vote of no confidence, which was decisively carried on 30 June. Reid was refused

41 Parl. Debs (H.R.) Vol. 24, at pp. 8148-9.

42 Parl. Debs (H.R.) Vol. 22, at p. 5981.

43 Crisp: op. cit., at p. 160.

a dissolution and resigned on 4 July. Deakin was commissioned to form a ministry, and Isaacs was included as Attorney-General.[44] The other members of the ministry were Lyne as minister for Trade and Customs, Forrest as Treasurer, Chapman (Postmaster-General), Senator Playford (Defence), Littleton Groom (Home Affairs), Ewing (Vice-President of the Executive Council) and Senator J. H. Keating (minister without portfolio). Senator Keating's son, John Keating, later became Isaacs' associate in his last years as an Associate Justice and then as Chief Justice of the High Court.

Among the papers which survive is a warm letter of congratulations to Isaacs from Mr Justice O'Connor who had been associated with him since the days of the convention of 1897-8. O'Connor was a fine and well-loved man and a good judge—we have it on the very best testimony that his judicial work has lived better than that of anybody else of the earlier time[45]—and his letter must have given Isaacs much pleasure.

Private

Mossvale
6/July/05

My dear Mr Attorney,

I have no politics. But I suppose a man need not give up his friendships when he goes on the Bench because his friends happen to be public men. Accept my hearty congratulations on your attainment of the leadership of the Bar of Australia. May you long continue to hold it.

R. E. O'Connor.

Isaacs was Attorney-General of the Commonwealth from July 1905 until his appointment to the High Court of Australia in October 1906. A cabinet photograph shows him seated on Deakin's left hand, trim and vigorous at the age of fifty. The best word picture of him as Attorney-General was given by Sir Robert Garran who as Secretary to the Attorney-General's Department had an

[44] Of his appointment La Nauze writes: 'The second Victorian in the Cabinet, and the most eminent of the new-comers, was the Attorney-General, Isaac Isaacs. As the leader of the radical liberals who had left Deakin in August 1904 he could hardly have been ignored; but in any case Watson would have felt bound to press for his inclusion as repayment of the support he had given to Labour. Few outside his own family positively warmed to him, but all recognized his admirable determination, his outstanding talents and his extraordinary industry.' Alfred Deakin Vol. 2, at pp. 403-4.

[45] Sir Owen Dixon: Jesting Pilate (Law Book Company of Australia 1965) at p. 258.

excellent opportunity to observe him at work. He wrote in his autobiography:

> [Isaacs'] capacity for work was amazing. By day he carried on the biggest practice of the Victorian Bar; by night he did full justice to the duties of Attorney-General.
>
> He sometimes slept, I must believe, though I could never discover when. I once left him at the office at midnight, and on my way home took to the printer a draft bill that was to be ready in the morning. Coming to the office early, I found on my table an envelope from the Government Printer, containing an entirely different draft, which, in some wonderment, I took in to the Attorney. He confessed that in the small hours he had had a new inspiration, and had recovered the draft from the printer, and had reshaped it, lock, stock and barrel.
>
> Isaacs had an extraordinary photographic memory. . . . When I was discussing points of law with him in the Attorney-General's room he would say to me something like this: 'You will find a case in point in three Meeson & Welsby at page 250, Jones against—I have forgotten the defendant's name, but the passage is half way down the page on the left hand side.' I used at first to think that he had readied these little things up for me, but I tested him carefully on points that he could not have expected me to bring up, and I have no doubt about the genuineness of this gift. Isaacs had a remarkably keen brain, but it was apt to be sometimes too subtle for my liking. When we were drafting a bill whose constitutionality was not beyond doubt, his devices to conceal any possible want of power were sometimes so ingenuous as to raise, rather than evade, suspicion. 'In vain is the net spread in sight of the bird.'[46]

These are words which reveal genuine but critical admiration, rather than affection, and in many respects the portrait is authentic. Since the seat of government was then in Melbourne, Isaacs was able to carry on his very large private practice by day, and it was then a practice with many powerful corporate clients. There were problems in the conduct of such a private practice and it was charged against Isaacs as Attorney-General of the Commonwealth, as it had been charged against him as Attorney-General for Victoria, that in the conduct of his private practice he had acted inconsistently with his public responsibilities. In August 1905, in the House, Mr Joseph Cook criticized Isaacs for accepting a retainer from the South Australian government on matters relating to the use of the Murray River waters for irrigation, navigation

46 Prosper the Commonwealth, at pp. 157-8.

and water supply. Three States were directly concerned: New South Wales, Victoria and South Australia. South Australia was aggrieved at the failure to take appropriate concerted action, and there was some pressure there to institute proceedings against Victoria. P. M. Glynn, M.H.R., was asked to prepare a brief on the rights of the States to the Murray waters. Glynn prepared a monumental two volume case for opinion which was submitted to Isaacs and Josiah Symon (Attorney-General in the Reid administration), who were both retained by the South Australian government. Isaacs and Symon conferred with Glynn late in 1905 and in March 1906 submitted their opinions which, except in marginal matters, supported Glynn's case for riparian rights.[47] Cook put it that the Attorney-General of the Commonwealth ought not to be in a position in which his public responsibilities and functions might conflict with obligations he had undertaken to a State government. 'He cannot,' said Cook, 'be our legal watchdog, and, at the same time, the legal watchdog of the South Australian government.'[48] Isaacs was not in the House when the matter was raised and he was defended by Deakin, Higgins and others. Deakin observed that no objection had been taken to Symon's retainer when he was Attorney-General. Isaacs came in to defend himself vigorously.

> Some months ago I received a retainer from the South Australian government—a retainer that I was bound to accept as an ordinary practising barrister. It is not for me to choose my clients. . . . The question which was put before me was one of riparian rights between States, and did not concern the Commonwealth in a single particular. As far as I am able to judge there is no Commonwealth right involved. The Commonwealth is well protected as regards its powers over navigation . . . if I could not accept a retainer for a State I could not hold one for an individual who might complain that his riparian rights have been interfered with. If Commonwealth rights were involved, I can only say that I should instantly retire from my position as adviser of the South Australian government. . . . But until that occurs—and it has not occurred and I fail to see how it can possibly occur—I am not only justified, but am bound to hold my retainer, and do my duty to my client.[49]

[47] See O'Collins: Patrick McMahon Glynn (Melbourne University Press 1965) at pp. 215ff.

[48] Parl. Debs (H.R.) Vol. 26, at p. 1330.

[49] ibid, at pp. 1350-1.

Isaacs angrily said that the charges were intended as a vote of censure on him and on the government to which he belonged. He was not in a position to give up the whole of his private practice, and it had to be borne in mind that the Attorney-General of the United Kingdom was in a different situation insofar as he was paid a large sum in fees in addition to his ministerial salary to compensate him for the loss of his private practice.

Commonwealth Attorneys-General of more recent times have not been faced with these problems because, it is understood, they have given up private practice during their tenure of public office. As the situation then stood, Isaacs' case was strong, and he was strongly defended by others. But it is hardly appropriate that in a federal form of government, a Commonwealth Attorney-General should act as a private adviser to a State government. Nor is it fitting that he should act as counsel, as Isaacs did in the Supreme Court of Victoria and the High Court of Australia in *Attorney-General on the relation of the Metropolitan Gas Co. v. Mayor etc. of the City of Melbourne*,[50] on behalf of the defendant, an undertaker under the State electrical supply act, opposing an action for an injunction brought by the Attorney-General of Victoria in a relator action. The proper course is surely to require the Attorney-General to attend exclusively to public business, and to see that he is adequately remunerated from the public purse. The argument, of course, goes beyond Attorneys-General to ministers generally; it is surprising, to say the least, that in some Australian States ministers may retain directorships of public companies and carry on private occupations.

Isaacs' activities as a barrister during the years in which he was in the federal parliament and on the government bench will be noted later. It is a commentary on his great energies and will that he was able to do all this public and private work. If some charged against him that he neglected his public duties, it was rebutted by such men as Garran, who were in the best position to know. Garran's testimony to his remarkable memory and citation of authority is repeated by others, though sometimes in a less kindly way. Counsel who appeared before him in the High Court have said that he would make references of this detailed sort to authority, and it would then be discovered that he had the relevant book or books in his room at the time. Stories of this sort are told about

[50] [1906] V.L.R. 36. Reversed on appeal, where Isaacs was the successful counsel (1906) 3 C.L.R. 467.

Isaacs, and without doubt there were those at the Bar and on the Bench who did not like him and charged against him many things, including over-smartness. It is a biographer's responsibility sometimes to record, without satisfactory opportunity to test the truth in every case, and there is significance in the fact that stories are told, and repeatedly told—significance not only in connection with the truth or otherwise of what is told, but also in the fact that such stories reveal the image of a man and the attitudes of some at least of those who knew him. In the case of Isaacs, the biographer's search reveals that there were those who hated or at least disliked and distrusted him; there were those who had the warmest affection and the kindest regard for him. It is hard to find neutrals. But this takes us far afield from the question of his powers of memory; the range of his knowledge and recollection was immense and Garran again gives testimony to the accuracy of his recollection of such details as case citations. No doubt the demonstration that he was right in his citations gave Isaacs the same satisfaction as is given to other men when they are found right in the remembrance of not very important details.

During Isaacs' term of office as Attorney-General, important legislative measures were brought before the parliament. Some were inherited: the Trade Marks Act had had an extended history dating from the first Deakin government, and when it was introduced into the Senate during the Watson administration, Senator Pearce proposed that provision should be made for 'trade union labels' to indicate that goods had been made in an enterprise employing members of a trade union which registered the label, and he referred to Western Australian legislative precedent. The proposal was attacked on constitutional and policy grounds. The measure was further considered during the Reid administration, and the matter was brought to a conclusion when Deakin again took office in 1905. In committee, the union label was sharply attacked. Both the constitutional and policy arguments were pressed: the constitutional argument was that there was no head of power to support any such provision; section 51 (xviii), in conferring power on the Commonwealth parliament to legislate with respect to *trade* marks, did not authorize *union* labels. The policy objections were in substance that such marks might encourage or lead to boycotts of non-union goods.

Isaacs vigorously supported provisions for union labels. As for the policy argument:

> It is no more boycotting for a union to ask the public in a peaceable way to support it than for a candidate for office to ask his electors to vote for him in preference to his rival. . . . What would be the use of an ordinary trader putting a mark upon his goods if he did not expect a large number of people to favour those goods? To my mind this is a peaceful way of asking the people whether they will support the unions or not.[51]

He also spoke of the weakness of labour relative to capital and management. On the constitutional question, he argued that section 51 (xviii) should not be so restrictively interpreted, that its scope was not confined to laws with respect to trade marks used by a seller of goods to denote that they were made by him; that the worker's aptitude in his trade was his property and if by a mark he could have it identified as his in the market, he might enhance its saleable value and thus secure the same sort of advantage as his employer had, and by similar means. He supported the constitutional argument by reference to American cases and in any event, Isaacs argued, constitutional questions were for the courts and not for the parliament.[52] The legal question was later answered by the High Court which by a majority, Justices Isaacs and Higgins dissenting, held in the *Union Label Case*[53] that the legislation providing for the union label was unconstitutional.

The union label provisions were strongly opposed, and to meet this, closure rules were introduced and applied. In December 1905, when the quarrel over the union label was sharp, Isaacs introduced Part VIII of the bill (the union label was in Part VII) to provide for a Commonwealth mark, the purpose of which was to certify that the goods bearing the mark had been made in Australia under conditions regarded by the parliament as fair and reasonable. In the heat of the debate on the union label, little attention was given to this unusual provision.

Concern with fair conditions of labour characterized the 'new protection' legislation of this administration. The notion of linking protection of local industries with a requirement that those who benefited by it should share those benefits with their workers,

51 Parl. Debs (H.R.) Vol. 2, at pp. 6079, 6083.

52 Jessie Groom: Nation Building in Australia (Angus & Robertson 1941) at p. 43 says of the union label provisions: 'These were included and their validity vehemently supported by Isaacs against the views of some of his permanent officials.'

53 *Attorney-General for New South Wales v. The Brewery Employees Union of New South Wales and Others* (1908) 6 C.L.R. 469. See p. 155 below.

by providing fair conditions of work and wages, antedated federation. It was discussed in the Victorian parliament in the nineties, and the term 'new protection' appeared in the *Age* newspaper from 1899. It has been said that its originator was probably Samuel Mauger, a hat manufacturer who had been the founder of the Anti-Sweating League, a supporter of wages boards and a high protectionist.[54] Isaacs, of course, knew Mauger well, and he was one of the parliamentary group who joined Isaacs and Lyne in opposition to Reid. In later years Isaacs spoke very warmly of Mauger's influence upon his thinking and social philosophy. The device of using the taxation power to effect social policies which could not constitutionally be directly implemented by the Commonwealth was first employed in the Excise Tariff Act 1902 which imposed higher duty on sugar made by coloured labour. In 1906, the Excise Tariff Bill, which was debated during Isaacs' term of office as Attorney-General and received the Royal Assent on 12 October 1906, the date of his appointment to the High Court, imposed duties of excise on agricultural machinery and exempted goods manufactured in Australia under conditions of remuneration adjudged to be fair and reasonable as determined by various alternate authorities. There was protracted debate, again raising questions of principle and constitutionality. Isaacs gave strong support to the general policy of the new protection and certainly did not indicate any doubts about its constitutionality.[55] Later, however, in *Barger's Case*,[56] this Excise Tariff Act was held unconstitutional on various grounds, over the strong dissent of Isaacs and Higgins JJ.

The Australian Industries Preservation Act also became law during Isaacs' term as Attorney-General. It was described as an Act for the preservation of Australian industries and for the repression of destructive monopolies. It was designed to strike at monopolization and at trade practices which restrained trade and commerce or destroyed or injured Australian industry by means of unfair competition, and to protect Australian industry against unfair competition by means of dumping. There was a fairly general and genuine concern with the harmful effects of monopoly and a particular concern with the problems of the agricultural machinery industry, and the Deakin administration, which depended on

[54] La Nauze: Alfred Deakin Vol. 2, at pp. 410-11.

[55] Parl. Debs (H.R.) Vol. 34, at p. 546. Sawer: Australian Federal Politics and Law 1901-1929, at p. 55.

[56] *R. v. Barger* (1908) 4 C.L.R. 41. See p. 155 below.

Labour support, may well have viewed this legislation as a preferable alternative to nationalization.[57] Although widely differing views were expressed, particularly on internal monopolization and the means of dealing with it, the bill passed into law without strong opposition. Isaacs vigorously supported the bill.

> If we have any desire to make this country what I think it may well become—perhaps not in the immediate future but it can commence now—a great manufacturing country, a country that can hold its many millions of people as other continents do, a country that can have diversity of occupation and diversity of employment with a population not confined to the margin of the continent, but spreading over its interior—then I say that it is necessary to see that its manufacturing industries and its national resources which may easily be turned into secondary sources of production are not stifled, perhaps in the very first years of the Commonwealth, by the power of numbers and the power of aggregated wealth wrongly used to the repression of honest individual effort properly directed.[58]

Isaacs insisted in debate in the House and in committee that the bill was fairly drawn; that what was required to be proved in proceedings under the Act was both detriment to the public and intent to do injury. Sections 5 and 8 of the Act, which specifically dealt with the acts of corporations, were subsequently held invalid by the High Court in *Huddart Parker v. Moorehead*[59] over Isaacs J.'s sole dissent. Isaacs there argued for a sufficiently wide interpretation of section 51 (xx) of the constitution, the power to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. He maintained the view which he had taken in debate on the bill, that the corporation power had a very wide ambit. Section 51 (xx), he had said in parliament, confers 'full power over the operation of those corporations, whether they are carrying on interstate trade, foreign trade or trade within a State'.[60] The restrictive interpretation of that section by the majority in *Moorehead's Case* has severely inhibited Commonwealth legislative authority over companies. Again, as a judge sitting in the original jurisdiction of the High Court, Isaacs found against the defendants, ship owners

[57] Stalley: Federal Control of Monopoly in Australia, 3 University of Queensland L.R., at p. 263.

[58] Parl. Debs (H.R.) Vol. 31, at p. 376.

[59] (1908) 8 C.L.R. 330. See p. 155 below.

[60] Parl. Debs (H.R.) Vol. 31, at p. 376.

and colliery masters, for breaches of the Act in the *Coal Vend Case*.[61] That celebrated case, which went on appeal to the Full High Court and the Privy Council where Isaacs' decision was reversed,[62] was the most important action ever brought under the Australian Industries Preservation Act. At the time when the action was brought, amendments to the Act dispensing with the requirement of proof of an intent to restrain interstate trade to the detriment of the public were not yet operative. In the early 1960s the Act was invoked in a number of cases,[63] but it was substantially repealed by the Trade Practices Act 1965.

Isaacs was concerned with various other legislative measures. Reference has already been made to the Judiciary Act 1906 which increased the membership of the High Court by two. In the debate Joseph Cook suggested that it would be desirable to authorize the High Court to give advisory opinions. Isaacs answered that 'we have not that power under the constitution',[64] a view sustained by the High Court in *The Advisory Opinions Case*[65] where the court held invalid Commonwealth legislation purporting to require the court to give advisory opinions. In the debate on the Post and Telegraph Bill in committee in 1906, a few days before his appointment to the High Court, Isaacs returned to a favourite subject of his days in Victorian politics, the repression of gambling. Power was given to the Postmaster-General to disconnect telephones which he reasonably supposed were being used for gaming or betting or illegal or immoral purposes.

> I venture [said Isaacs] to support very strongly those who are trying to repress gambling, because I think that it does more damage to the community than can be estimated in mere money. The moral fibre of the people is being injured, and I should be glad to see unanimous support given to the efforts which we are making to repress this evil.[66]

[61] *The King and the Attorney-General of the Commonwealth v. Associated Northern Collieries* (1911) 14 C.L.R. 387. See p. 136 below.

[62] *Adelaide Steamship Co. Ltd v. The King and Attorney-General of the Commonwealth* (1912) 15 C.L.R. 65 (High Court); *Attorney-General of the Commonwealth v. Adelaide Steamship Co.* [1913] A.C. 781 (Privy Council).

[63] The first of these was *Redfern v. Dunlop Rubber Australia Ltd* (1963) 110 C.L.R. 194.

[64] Parl. Debs (H.R.) Vol. 32, at p. 1624.

[65] *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.

[66] Parl. Debs (H.R.) Vol. 35, at p. 6013.

The Referendum (Constitution Alteration) Act, which became law on 8 October 1906, provided machinery for the conduct of constitutional referenda held pursuant to section 128 of the constitution.

Reference has already been made to the fact that throughout his years in the federal parliament and as Attorney-General of the Commonwealth, Isaacs had been engaged in private practice, the biggest practice at the Victorian Bar as Garran tells us. His retainer book for these years contains the names of a very wide range of clients, including many powerful and important corporate clients, and he was briefed by many leading firms of solicitors. He made an early appearance in cases raising important constitutional issues. In 1902, before the High Court was established, in *Wollaston's Case*[67] the question was raised whether the salary of the permanent head of the Commonwealth Customs Department, who was domiciled and resident in Victoria and performed the major part of his official work for the Commonwealth in the Customs House, Melbourne, was subject to Victorian State income tax. Isaacs led for the Commissioner of Taxes, while Higgins appeared for Dr Wollaston. Isaacs argued that the salary was clearly earned in Victoria and that there was no warrant for arguing that the State taxing law could not apply to it. He was not permitted by the court to develop arguments distinguishing the Australian from the American situation until his reply, when he argued that the doctrine of *McCulloch v. Maryland*,[68] holding that a State of the Union had no power by taxation or otherwise to impede or control any of the constitutional means or laws by which the federal government was seeking to carry into effect its constitutional powers, did not apply to exempt a federal officer from State taxation. The situation in the Australian federation was distinguishable, he argued, for various reasons. Whereas in the United States the principle enunciated by Chief Justice Marshall was one of necessity, the Australian federation had a different base in structure and authority, and in words which were to recur in like form over many years, he said:

> In Australia, the Crown, equally in all cases, whether of the States or the Commonwealth, takes part in legislation, and is in every case the apex of power. The Crown is one and indivisible; it is the same in Victoria as in every other of His Majesty's Dominions.[69]

[67] (1902) 28 C.L.R. 357.
[68] (1819) 4 Wheat. 316.
[69] (1902) 28 C.L.R., at p. 372.

This argument prevailed in the Victorian Supreme Court. The original High Court (Griffith C.J., Barton and O'Connor JJ.) took a different view, and in *D'Emden v. Pedder*,[70] in February 1904, first asserted the applicability of the American doctrine of *McCulloch v. Maryland* to the Australian federal constitution. Isaacs did not appear in that case; Drake, who was Attorney-General for the Commonwealth, successfully argued that a federal officer was immune from the obligation to give a stamped receipt under State law for his salary. In *Deakin v. Webb* and *Lyne v. Webb*[71] which were fully argued together later in the same year, the High Court followed *D'Emden v. Pedder* in holding that the Commonwealth salaries paid to Deakin and Lyne were not subject to State income tax. This reversed the decision of the Victorian Supreme Court, which had followed *Wollaston's Case*, and distinguished *D'Emden v. Pedder*. Higgins, now Attorney-General in the Watson administration, led for the appellants and Isaacs led for the Commissioner of Taxes. Isaacs elaborately developed the arguments he had put in *Wollaston's Case*. He distinguished the Australian and the United States constitutions. In Australia it had been the custom

> to trust parliament whereas in the United States, members were looked on as mere delegates and the powers of parliament were considered as liable to abuse and therefore to be closely watched.

There was an early statement by Isaacs of views which were to be developed on the Bench, and which were to come to their full flowering in the *Engineers' Case*.[72]

> In the Australian States we have responsible government, in America the legislative and executive parts of the government are distinctly separated. In Australia there is the protecting power of the Crown, in America there is no power above the Union, and the only protection for the Union and the States is the Supreme Court.[73]

Also, as a practical matter, there was power and discretion in the court in a particular case to say that there was an interference with federal operations.

Isaacs thereupon asked for a certificate, as required by section 74 of the constitution, to allow an appeal to the Privy Council. That

[70] (1904) 1 C.L.R. 91.
[71] (1904) 1 C.L.R. 585.
[72] (1920) 28 C.L.R. 129. See p. 160 below.
[73] (1904) 1 C.L.R. 585, at p. 600.

section, so far as material, provided that no appeal should be permitted to the Privy Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States unless the High Court should certify that the question was one which ought to be determined by the Privy Council. Section 74 was the critical compromise section in the constitution; as the constitution bill had originally been adopted in Australia, appeals to the Privy Council were more drastically curtailed. The United Kingdom government was unwilling to accept this; as Griffith C.J. said in *Deakin v. Webb*:[74] 'the establishment of the Commonwealth very nearly fell through in consequence of the differences of opinion upon the point'. He did not have occasion to add that as Chief Justice of Queensland he had encouraged the United Kingdom government in its opposition. *Deakin v. Webb* plainly raised an *inter se* question, and Isaacs in moving for a certificate pointed out that the Premiers of all six States had given their support to the application for a final determination of the matter by the Privy Council. Griffith C.J. said that he had listened to this argument

> with some amazement. . . . I hope that the day will never come when this court will strain its ear to catch the breath of public opinion before coming to a decision in the exercise of its judicial functions.[75]

Of the argument stressing the importance of the issue, it was said that this was distinctively a matter which the High Court should determine. In formulating this reason as a ground for refusing a certificate, Griffith and the court were stating for the first time what many judges, in my view rightly, have asserted as a ground for refusing a certificate. A certificate has been granted in one case only in the history of Australian federalism.[76] As Sir Owen Dixon said, almost half a century later:

> the basal purposes of s. 74 and of the principles upon which this court has proceeded have been to confine the final decision of the characteristically federal questions described by s. 74 to a jurisdiction exercised within the federal system by a court to which the problems and special conceptions of federalism must become very familiar.[77]

[74] at p. 622. [75] at p. 625.

[76] *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. Ltd* (1912) 15 C.L.R. 182 (H.C.); [1914] A.C. 237 (P.C.).

[77] *Nelungaloo Pty Ltd v. Commonwealth* (1952) 85 C.L.R. 545, at p. 572.

Isaacs as a judge generally supported this view, though he was a member of the Bench which granted the certificate in the *Royal Commissions Case* in 1912. There, on the substantive issues, the court was equally divided, Isaacs and Higgins dissenting from the views of Griffith C.J. and Barton J., and the court speaking through Griffith said simply that this was a case in which a certificate should be granted and stated the form of the question for the Privy Council.

Between 1901 and 1906, Isaacs appeared as a leader in well over one hundred reported cases[78] in the Victorian Supreme Court, which covered a very wide range of matters. He also appeared in twenty-five reported cases in the High Court.[79] Once again the range was very wide. In the second reported case in the Commonwealth Law Reports, *Bond v. The Commonwealth of Australia*[80] Isaacs successfully argued a claim on behalf of a transferred officer in the post office which raised issues under section 69 of the constitution.[81] Another early case raised important questions with respect to the relationships between Commonwealth and State governments, in the context of the liability of a servant of an independent contractor to the Commonwealth to conviction for a breach of a State law.[82] In *Parkin v. James*,[83] questions arising under section 73 of the constitution (relating to the appellate jurisdiction of the High Court) were argued. The other reported cases in which Isaacs appeared covered many areas of law: he argued will, trust and administration matters, liability to land tax, mining law, and matters of statutory construction. His last reported case before the High Court, *Amos v. Fraser*,[84] argued less than a month before he took his seat on the High Court, turned principally on matters relating to appeals to the High Court. What is remarkable in the study of his cases is not so much their range and extent, as the fact that he was able to carry on such an extensive and wide-ranging practice while conducting, and effectively conducting, a busy public life as a parliamentarian and later as principal law officer of the Crown.

The Judiciary Act received the assent at the end of August 1906, so that there were two new appointments to be made to the High

[78] Reported in the Victorian Law Reports.

[79] Reported in the Commonwealth Law Reports.

[80] (1904) 1 C.L.R. 13.

[81] Relating to the transferred departments.

[82] *Roberts v. Ahern* (1904) 1 C.L.R. 406.

[83] (1905) 2 C.L.R. 315.

[84] (1906) 4 C.L.R. 78.

Court. On 23 August, the day on which the bill passed its third reading in the Senate, a letter signed by all of Deakin's eight cabinet colleagues, led by Isaacs, requested Deakin to take one of the seats. La Nauze says that it is not clear what prompted this suggestion, and in any event Deakin rejected it.[85] An offer of a seat on the court was made to Sir Samuel Way, the Chief Justice of South Australia, but he was too long and firmly and influentially established in South Australia to entertain the offer. In the event, the appointments were offered to and accepted by Isaacs and Higgins. Isaacs' appointment was dated 12 October 1906, and Higgins' the following day. Isaacs wrote to Deakin on 12 October:

> As my leader you have been all I could ever have hoped for, and more than any other man could or would have been: knowing what you wanted, directive, encouraging, forbearing and appreciative, and most of all willing and anxious to overlook shortcomings when results did not reach your expectations . . . to serve under you has been to me at once a privilege, a pleasure and an honour, above all that went before.[86]

Deakin wrote to Higgins on 16 October (presumably there was also a letter to Isaacs) about the appointments.

> We shall lose two seats but they are well forfeited since they have given the Commonwealth two Justices whose equals are not to be found within its borders.[87]

Isaacs was succeeded as Attorney-General by Littleton Groom and he and J. L. Purves, K.C., of the Victorian Bar welcomed Isaacs when he took his seat on the Bench for the first time on 15 October 1906. Isaacs in a short reply said that he had some regret at the severance from political life, but he was now divorced from politics, and his life for the future lay in the law.

No doubt Isaacs had greatly enjoyed his political career. But he was not a man to look backward, and it is likely that he came to the Bench without regret and with a proud sense that with no advantage of birth or connections he had attained such high judicial office. He was entering upon the most fruitful period of his long career; for almost a quarter-century as a puisne Justice

[85] La Nauze: Alfred Deakin Vol. 2, at pp. 415-16.

[86] cited La Nauze: op. cit., at p. 417.

[87] Deakin Papers (Australian National Library of Australia, Canberra); also cited La Nauze, op. cit., at p. 418.

and, in the last few months, as Chief Justice of the High Court he was to make distinguished contributions to the law. His political career in State and federal politics had extended over fourteen years. His intellectual capacities, his drive and his prodigious energy had led him to success in both political spheres: he held high office and he discharged the duties of those offices with great ability. He could do this while carrying on extensive private practice, and he was able to repel charges that he was neglecting his public office, or at least preferring his private interest to his public responsibilities. There can be little doubt that he neglected neither; the fact that such charges were made serves to emphasize that he was never a popular figure in political life and that he won place and position by ability and drive without the assistance that personal liking and regard would have given. One need not be mealy-mouthed, and it should be said that his Jewishness did not make it any easier for him to win his way to high places in public life. There were times in debate in the Victorian and the federal parliament when Isaacs was stung by references to his Jewishness, and he responded angrily, but quite fearlessly. Deakin's picture of him in the days of the convention of 1897-8 was, in essentials, right; that he was not popular; that his long, sometimes tedious and doctrinaire and florid speeches must have irritated, bored and at times driven his colleagues to distraction. His motives were suspect—Isaacs, wrote Garran in his diary at that time, was the serpent.[88] He must have had a very keen sense of standing alone and apart from his peers in political and professional life. His only close relationships were with his family, and the deepest attachment, it seemed, was to the parental Isaacs family—his parents, his brother and sisters. His father had died in 1904, a much more shadowy and gentle figure than the formidable and powerful mother to whom Isaacs was so strongly bound. She survived her husband by eight years and died in August 1912.

Isaacs' political creed was, in the terms of its time, radical. He had a good deal of sympathy for many aspects of the Labour programme without being in any way a supporter of socialism. He saw the importance and the virtues of union organization and lectured his parliamentary colleagues upon them; he saw the justice of the demand for fair and reasonable working conditions and just wages, and perceived the need for State intervention to

[88] Prosper the Commonwealth, at p. 121.

see that these were secured to the workers. He supported measures to deal with sweating; he viewed gambling as an evil which struck primarily at the welfare of the working man and his family; and he sympathized with women's suffrage. These views found expression in his activities as a State and as a federal politician.

Isaacs brought to parliament and government a high legal skill and massive knowledge and learning. He justly earned high praise for his handling of company law matters in the Victorian parliament in the nineties, and one must be impressed by the wide-ranging knowledge of the law and experience of the United States, Canada and other countries which he revealed in debate in the federal convention. He made valuable and important contributions to the parliamentary debates on many foundation measures in the early Commonwealth days.

He yielded to none in the vigour of his support for White Australia. The language he used in support of that policy is ugly and distasteful to a reader of the debates sixty years on, but Isaacs could not resist hyperbole, and what he then said commanded general acceptance in its statement of policy and, alas, in its formulation. He was, then and always, an ardent imperialist. In a defence debate in 1903 he said that:

> the most unfaltering allegiance to Australia is not incompatible with that larger British citizenship to which we all aspire, and whatever our troubles or our triumphs—and no man can foretell them—I trust that the paths of ourselves and our brethren may so far run together that we may as Australians always proudly claim as a right to share in the perils and the glories of the united British Empire.[89]

His political radicalism, his devotion to White Australia, sat very comfortably with an ardent support for the association 'of the great white nations that gather under the folds of the British flag'.[90] He lived on long enough to see the change which brought India, Pakistan and Ceylon into a multi-racial association which now called itself a Commonwealth and no longer found acceptable the notions enshrined in the word Empire.

[89] Parl. Debs (H.R.) Vol. 14, at p. 2350.

[90] ibid.

6

The High Court Bench: 1906-1930

ISAACS was a member of the High Court Bench for twenty-four years. In early 1920, when Barton died, he became the senior puisne judge, and in April 1930 he succeeded Knox as Chief Justice of the court. He resigned from the court in January 1931 on his appointment as Governor-General of Australia. This period of almost a quarter-century as a judge was without doubt the most fruitful and important period of his career. In his introduction to Max Gordon's life of Isaacs, Sir Owen Dixon, who appeared before Isaacs many times as counsel and was his colleague on the High Court Bench from February 1929, wrote that he

> found it difficult to think of him except as the greatly talented occupant of the office to which he had gone at his maturity, that of a judge of the High Court of Australia, an office to which he had devoted himself with an energy, a learning, a concentration of mind and an intellectual resourcefulness which can seldom have been equalled.[1]

As at other stages of his life, Isaacs as a member of the Bench was a controversial and not a popular figure, but there would be general professional agreement with this assessment.

As Dixon observed, Isaacs came to the Bench at his maturity. He was fifty-one at the date of his appointment, and seventy-five at the date of his retirement. Throughout that long period of middle and later life he approached his judicial duties with immense vigour and an undiminishing appetite and with a capacity for long, hard and sustained work.

At the time of his appointment, the Bench of the High Court consisted of the three original judges who had been appointed in 1903. Isaacs had been associated with Barton and O'Connor in the Federal Convention of 1897-8 and in the Commonwealth Parliament. Griffith had retired from direct association with politics and the federal movement in 1893 when he became Chief Justice

[1] Foreword to Max Gordon: Sir Isaac Isaacs (Heinemann 1963).

of Queensland, although it is quite clear that he was active behind the scenes in the later years of constitution making. It is not likely that Isaacs had had much opportunity for personal association with him, though he appeared as counsel before Griffith quite frequently in the early years of the High Court. With Higgins, who was appointed to the court at the same time, Isaacs had had a long association at the Bar, in the Federal Convention, and in State and federal politics. In 1913 three new judges were appointed to the court, one in succession to O'Connor, and the others as additional judges when the Judiciary Act 1912 increased by two the number of associate justices of the court. The new judges were Frank Gavan Duffy, Charles Powers and George Edward Rich. Duffy and Powers were slightly older than Isaacs; Duffy had come to the Victorian Bar a few years before Isaacs and had a distinguished and successful career in practice there. Powers came from Queensland: he had been Crown Solicitor for Queensland, and from 1903 until his appointment to the Bench he was Crown Solicitor for the Commonwealth. Rich was a New South Wales barrister who had taken silk in 1911 and had been a justice of the Supreme Court of New South Wales from 1911 to 1913.

On the retirement of Griffith in 1919, Adrian Knox was appointed Chief Justice. Knox had been an able and distinguished leader at the New South Wales Bar, with a substantial practice before the High Court. There appears to have been some feeling in the court that on the retirement of Griffith, Barton should have been offered the Chief Justiceship.[2] Barton died early in 1920, and was succeeded by a Victorian, Hayden Erskine Starke. Higgins died in January 1929 while still a member of the court and was succeeded by Owen Dixon who was then the most eminent figure at the Victorian Bar, and was to establish for himself a pre-eminent position as a judge. Later in 1929 Powers retired but was not replaced until December 1930 when Herbert Vere Evatt and Edward Aloysius McTiernan were appointed.[3] They came to the court just as Isaacs was leaving it.

[2] Reynolds: Edmund Barton (Angus & Robertson 1948) at p. 194 writes that 'Barton never expressed himself on the subject, but he must have felt slighted at being passed over when the successor to Griffith was appointed'.

[3] The decision to make these appointments was taken by the Labour caucus over the opposition of the Prime Minister J. H. Scullin and the Attorney-General, Frank Brennan, who were out of Australia when the appointments were announced. See Sawer: Australian Federal Politics and Law 1929-1949 (Melbourne University Press 1963) at p. 34.

Griffith, Barton, O'Connor, Isaacs and Higgins had all been active politicians and all were founding fathers. They came to the High Court, and particularly to the task of constitutional interpretation, with views significantly affected by their own reading of the intendment of the constitution. Of the three judges appointed in 1913, Powers alone had been in politics—he was for a considerable period actively involved in Queensland politics—while Duffy and Rich had made their careers in the law. Sawer observes that the successors of the first five judges, not having their ideological background in constitutional matters, tended 'to apply ordinary English common law principles of interpretation in a more literal fashion than did the senior justices'.[4] This was true also of Knox who came to the court as Chief Justice in 1919. He had had a short term in the New South Wales legislature in the nineties, but did not have strong political interests. During the 1920s he and Duffy tended, particularly in cases involving the industrial arbitration power, to take up a position in opposition to Isaacs' insistent support of federal power. Duffy had also dissented in the *Engineers' Case*[5] and had there stated a States' rights position which opposed him to Isaacs' doctrine and aligned him with the views of Griffith and Barton who, by that time, were gone from the court.

On public occasions, Isaacs spoke in high praise of his two senior colleagues, Griffith and Barton, with whom he served on the court for almost a decade and a half. When the court assembled to pay tribute to Griffith in July 1919 Isaacs praised his qualities and achievements, and when only a few months later Barton died, he spoke not only of his public career and achievements, but also of his 'unfailing gentleness of disposition, his personal attraction and warm sympathy of soul—qualities that always endeared him to his colleagues'.[6] These words sit oddly with Barton's own judgment of Isaacs which comes out very strongly in letters to Griffith written in 1913 when Griffith was abroad and Barton was writing to him regularly on matters which principally related to the business of the court. At this time there was some talk of the creation of an Imperial Court of Appeal and of Griffith's possible appointment to it. In a letter dated 22 June 1913, Barton wrote:

[4] Sawer: Australian Federal Politics and Law 1901-1929 (Melbourne University Press 1956) at p. 106.

[5] (1920) 28 C.L.R. 129.

[6] Printed in 'Tributes to the late Sir Edmund Barton' 27 C.L.R.

It is plain to me, and I think to others, that Isaacs is building his hopes on your remaining in England and is trying to make such a big splash that he will make himself manifest as the right C.J. (But the Fisher Government have resigned—Neither party will be able to govern till after a double dissolution.) His judgments are swelling to bigger proportions than ever—in fact they are very weighty—in respect of paper: and he has assumed an oracular air in court that is quite laughable.

There follows a reference to actions of Higgins for whom Barton also appears to have had little regard.

Of course the game between him and Isaacs is to get a court of six, with the respondent in the Prohibitions sitting in the special case. You will see how little decency there is about these two men—All the same, I think they hate each other, although they conspire. They had a little brush at consultation yesterday. Then Higgins said most offensively: 'You see, you men are only talking about words, but I have to do with things.' I gently pointed out that the words we were talking about were the words of an Act of Parliament, which was apt to be a rather hard thing when people bumped against it. His manner, in his annoyance with Isaacs, was most offensive to all the rest of us.

A few days later, on 30 June, Barton wrote again to Griffith reporting among other things on the recently concluded Melbourne sittings of the court.

Isaacs uses his opinion which ostensibly agrees with mine to put his own interpretations on questions so as to give some answer, and just the answer Higgins wants: but in the second of the two cases he has been unable to escape a refusal to answer two of Higgins's questions—out of five. The whole affair is just a piece of manipulation however—I don't think there is the least bit of sincerity in the jewling's attitude.

Later in the same letter he wrote: 'The court for Perth will probably consist of Duffy, Rich and myself—and when the malign influence is not there too business gets along fairly well.' There is no doubt that the reference is to Isaacs. On 25 August he wrote 'Isaacs of course has his jaws slavering for the devouring of some decision of yours', and on 2 September:

Isaacs seems to be always trying to collogue[7] with our colleagues apart from me. I suspected this, but I have now confirmation of

[7] Talk confidentially (with suggestion of plotting, an obsolete sense).

it for there is reason to believe that Powers declines to be bulldozed.[8]

These letters were all written when Barton was Acting Chief Justice and it may be under some pressure, but there can be no doubt that he had a strong dislike and distrust of Isaacs. In his diary for 21 December 1918, Griffith records that 'Barton called in morning and told me of Isaacs' machinations', and three days later 'wrote to Barton returning Isaacs' letter with comments'. What those comments were does not appear, and it is likely that the later reference links up with the 'machinations'.

That Barton and Isaacs should not have had easy personal relations is not surprising. Barton was a clubman, a man who loved society and was comfortable and easy in it, a man who had a liking for ease and leisure. Isaacs was an intense, driving, ambitious man, in almost every respect the antithesis of his senior colleague on the Bench. They read the constitution differently: Barton supported a restrictive interpretation of federal power, and in particular viewed the industrial arbitration power with great reserve. When, as Prime Minister, Barton first introduced the Conciliation and Arbitration Act, he spoke of it in terms of cautious and limited application and, as we shall see, he protested from the Bench at broad interpretations which in his view sanctioned mere contrivances to attract the arbitration jurisdiction. Isaacs on the other hand became the ardent spokesman on the court for an advancing federal power, particularly in the industrial arbitration field, where he countenanced and, as it must have appeared to Barton, encouraged palpable devices to expand the jurisdiction. The substance, the florid style, the rhetoric and the length of Isaacs' expositions must have maddened Barton. In his correspondence with Griffith, unqualified dislike comes through very clearly and with no restraint. On Isaacs' part, there are no written records to indicate what he thought of Barton, but it is scarcely credible that he should not have known what Barton thought of him, or that Barton, a man of open character, should not have made it clear to him. Yet in his tribute on Barton's death Isaacs chose to speak not only of his public aspect and achievement—for that was how he spoke of Griffith—but also of admirable qualities of character.

Griffith's correspondence tells us little of his relations with Isaacs. His diaries for the last few years of his term on the court

[8] These letters are in the Griffith Papers 1903-4 in the Dixson Library, Sydney.

make few references to Isaacs; apart from the references to Barton and Isaacs already quoted, they are neutral. In a letter to Lady Griffith, written from Adelaide in 1912, he writes 'Mr Isaacs has another bee in his bonnet and we shall not be able to get away on Saturday as we had hoped.'[9]

Evatt, writing of the High Court in the second half of the first decade of the century, speaks however of the 'exceedingly fierce brushes between Chief Justice Griffith and Justice Isaacs [which] delighted the law students, if they scandalized the public'.[10] Griffith and Isaacs were not comfortable colleagues: both were dominant, driving, ambitious men. Griffith was a cold and austere man and he differed from Isaacs in style, in outlook and in legal philosophy. As Sir Owen Dixon has written, Griffith had:

> a legal mind of the Austinian age, representing the thoughts and learning of a period which had gone, but it was dominant and decisive. His mind clearly was of that calibre: he did not hesitate, he just felt that he knew; and that what he knew was right. So appearing before him was an interesting experience.[11]

Griffith's views of basic constitutional questions were substantially the same as Barton's, and more dogmatically expressed. He found the contrary views as formulated by Isaacs absurd, not to say outrageous, and said so plainly. In the *Woodworkers' Case* in 1909, Griffith spoke for a majority in denying power to the Arbitration Court to make an industrial award which was inconsistent with a determination of a Wages Board empowered by a State statute to fix a minimum rate of wages. With heavy emphasis, he dismissed the contrary argument which was vigorously put in dissent by Isaacs and Higgins.

> It is gravely maintained, however, that the tribunal . . . is not bound by any State laws relating to domestic trade . . . I find it difficult to treat such an argument with due gravity.[12]

Isaacs just as dogmatically put it that the Chief Justice's view was

> an absolute and hopeless contradiction to the plainest words of the Imperial Parliament, and, if it be correct, then there is practically no federal constitution at all.[13]

[9] Griffith Papers, Dixson Library, Sydney.

[10] H. V. Evatt: Australian Labour Leader (Angus & Robertson 1940) at p. 161.

[11] Jesting Pilate (Law Book Company of Australia 1965) at p. 258.

[12] *Federated Saw Mill Employees of Australasia v. James Moore & Son Pty Ltd* (1909) 8 C.L.R. 465, at p. 493.

[13] ibid, at p. 529.

The two men held sharply differing views about many aspects of federal power. The point here is not the doctrine, but the dogmatic and emphatic statements of opposing position, made the more dogmatic and emphatic, doubtless, because of the feelings of the two men towards each other. A few years later, in the *Royal Commissions Case*[14] in 1912, Isaacs came 'without personal doubt'[15] to a conclusion based upon an argument so meretricious in Griffith's view that 'I will waste no more words upon this contention'.[16] In *The King v. Snow*[17] the issue was whether the High Court might entertain an appeal from the Supreme Court of South Australia in a criminal case where the charge was an attempt to trade with the enemy contrary to the provisions of the Trading with the Enemy Act 1914. The trial judge had directed the jury to find a verdict of not guilty on the ground that the Act was not retrospective as to attempts to trade with the enemy at dates before the Act came into operation, and that as to subsequent dates there was no evidence to go to the jury. The majority led by Griffith held that leave to appeal to the High Court either from the judgment of acquittal or from the direction of the trial judge should be refused, while Isaacs and Higgins dissented. Isaacs argued elaborately and with copious citation of authority that an appeal lay to the High Court and that in this case leave to appeal should be granted. It was a war-time case, and on this occasion, as in other war cases, Isaacs revealed himself an ardent nationalist.

> The offence with which Snow was charged is one of unparalleled gravity in the history of Australia. . . . For a British subject in the hour of his country's greatest need to attempt to get 6000 tons of copper out of the control of the Empire is in itself, if proved, an unpardonable act; but when, in addition, if the accusation is true, the attempt contemplates handing it over, in return for pecuniary reward, to our enemies to sow death and destruction in our ranks, and those of our Allies, words utterly fail to describe the atrocity of the crime. If the charge is true in fact, it was no sudden slip, but a deliberate and sustained and sordid disregard by the accused of the ties of allegiance to the Sovereign, and the most sacred bonds of honour and fidelity and natural sentiment towards his fellow subjects.[18]

[14] *Colonial Sugar Refining Co. Ltd v. Attorney-General for the Commonwealth* (1912) 15 C.L.R. 182.

[15] at p. 217.

[16] at p. 195.

[17] (1915) 20 C.L.R. 315.

[18] at p. 330.

A high appeal court may undertake to hear a criminal case because an important point of law is at stake, or because, as Isaacs himself urged in other cases, life or liberty is at stake, but here Isaacs' proposition was that the enormity of the crime, if proved (and one may very easily guess what Isaacs thought), was such as to cry out for punishment. Griffith's response to this was a cold rebuke:

> I have refrained from making any reference to the nature of the offence with which the accused was charged, which is quite irrelevant to the question of our power to grant a new trial, and can only legitimately enter into our consideration, if at all, by way of warning, if we should be momentarily tempted to forget that the maxim *inter arma silent leges* has no application to the administration of the actual law, or to lose sight of the time-honoured practice of British Courts of Justice, which do not qualify their regard for the interests of accused, but unconvicted, persons by any reference to the gravity of the offences with which they are charged.[19]

One may sense in this case that there were deep feelings about issues which even Isaacs did not set out in his lengthy judgment, but the clash of views exposed a profound temperamental incompatibility between the two men and a willingness on the part of Griffith to administer public rebuke. Isaacs sounds here like a foaming Jacobin and what Griffith had to say gave expression to fundamental values in the common law. At a less dramatic level, there was another clash in this case where arguments accepted by Isaacs were treated contemptuously by Griffith who characterized them in familiar terms: an argument, he said, was addressed to the court 'with apparent seriousness. . . . It is difficult to treat such an argument with gravity.'[20]

By 1920 both Griffith and Barton were gone, and of the old court only Isaacs and Higgins remained. Barton had said in one of his letters to Griffith in 1913 that relations between Isaacs and Higgins were bad. They too were men of different temperament, though particularly in the earlier period they often, though not invariably, joined forces in opposition to the constitutional doctrine stated by the majority. There was in Higgins a strong vein of sentimentality which there certainly was not in Isaacs. Yet when Higgins died in office in 1929, Isaacs spoke of him warmly and with sensitivity:

[19] at p. 327.

[20] at pp. 323-4.

There will ever live in my memory his individual kindness of spirit —I never knew him to utter an unkind word—his courtesy, his marvellous fortitude that enabled him to stand up to his duty even under a grief that was well nigh devastating, his gentleness, his dignity under all circumstances.[21]

With Knox, who succeeded Griffith as Chief Justice, Isaacs was associated as senior puisne judge for a decade. They had little in common and the portrait we have of Knox from Sir Owen Dixon helps to explain why:

He was a conspicuous advocate, as strong an advocate and as keen-witted an advocate as you would ever wish to see; very powerful and with a highly developed intelligence. But he was of a type that you do not often meet: a highly intellectual man without any intellectual interests. . . . He was capable of almost anything, I should have judged, yet he was not capable of taking a really serious intellectual interest. He would read biographies, he would read history, he would read this, that, and the other; but I have known him, when I got to the Bench and sat with him, refuse to have anything to do with a judgment I wrote, on the ground that it sounded too philosophical for him. I think he meant it as a compliment to me, but there was a sort of cynicism about it, and it might have been true.[22]

Knox and Isaacs were men whose only point of connection was their common membership of the court. Knox was a man of affairs, deeply involved in the racing world, and his values and interests were quite alien to Isaacs. While Isaacs was absorbed in his judicial work and was the ardent and rhetorical advocate of the cause of national power, Knox was without deep commitment of this sort, and certainly had little sympathy for Isaacs' fervent nationalist positions and commitment to other causes in the law. But they worked together without serious friction, for the old disputes and strong dislikes were gone with the passing of the older judges. When Knox was about to retire from the court, he sent a personal hand-written letter to Isaacs.

High Court of Australia,
Judges' Chambers.
March 23rd, 1930.

My dear Isaacs

As I told you in my note I am off to Canberra tomorrow, Monday, morning early, and I think I ought to let you know the reason for

[21] 12 February 1929; printed in 41 C.L.R.

[22] Jesting Pilate, at p. 258.

my visit there. There is a meeting of the National Debt Commission on Tuesday morning, and my real purpose in going is to tender my resignation as Chief Justice. The fact is that my old friend John Brown has made me one of his residuary legatees, and this involves my taking a direct interest in the business of J. & A. Brown—a position quite incompatible with that of Chief Justice. Hence my decision to resign. I should have told you of this in Melbourne, but that I was asked by the others interested to say nothing about the matter until certain necessary arrangements had been made. I hope the Government will release me as from the end of this month, but in any event I shall not take my seat on the bench again.

I am very grateful to you for the loyal support you have always given me, and hope to see you to thank you personally on my return from Canberra on Wednesday or Thursday next.

With kind regards,
Yours sincerely,
Adrian Knox

P.S. I need hardly say that it is essential that no hint of the position should leak out until the matter has been dealt with by the Government. I am informing no one but my colleagues and rely on them to treat the matter as absolutely confidential. A.K.

It appears that Knox wrote in similar vein to the other members of the Bench. The letter is cool, polite and correct: it displays no regret at leaving the court, and certainly no warmth of affection for a senior colleague of long standing.

Under Knox, the court was loosely organized, and with his other colleagues Isaacs got along without too much friction. In the decade of Knox's Chief Justiceship, Isaacs was a dominant figure on the court, much given to talking on the Bench and to long rhetorical judgments which, whether in concurrence or dissent, exhibited an invincible certainty of viewpoint. This was not calculated to endear him to his brethren, just as at an earlier time his lengthy speeches in the convention and in the parliaments irritated fellow members. Starke particularly had a pragmatic outlook, a strong abrasive personality and little sympathy for Isaacs' doctrinal positions or his highflown rhetoric, and at times said harsh things about him.

Those below this level had a different view. Mr John Keating, the son of Senator J. H. Keating who had been a colleague of Isaacs in the second Deakin administration in 1905, became his associate in 1926 and remained with him for some four years until

he retired from the Bench. He has the warmest and most affectionate remembrances of Isaacs. Keating was a very young man when he joined Isaacs; he was not a lawyer and he served in effect as Isaacs' secretary and amanuensis. He would type judgments for Isaacs and make various personal arrangements for him, and he travelled interstate with him when the court was on circuit. Isaacs travelled by train and as a justice of the High Court a separate compartment was reserved for him. While travelling, he generally would not work; he would talk and read a great deal, often 'westerns' of the most trivial sort. Arrangements would be made in advance for special service for the judge and his party when the train stopped at station restaurants, and Keating recalls that Isaacs was always punctilious in thanking the restaurant staff for their services, and that this courtesy was much appreciated.

The judges made their separate arrangements for travelling, and Keating does not recall any close association between Isaacs and his colleagues. On the other hand, he cannot recall any clashes or overt hostility between them, and he says that relations were courteous and correct. Isaacs showed great personal interest in his associate and would walk with him in the city after court rose. He would talk freely about all manner of things; tell 'clever' and trick jokes and put puzzles to him. Isaacs was much given to this sort of thing: his letters to his daughters Marjorie and Nancy for many years, right up to the last years of his life, contain news and comment, jokes, miscellaneous observations on a wide range of matters, and mathematical, word and match puzzles. To the end of his life Keating remained on terms of the warmest friendship with Isaacs. In piecing together the picture of Isaacs as a man, it emerges again and again that he was disliked and distrusted by professional, political and judicial colleagues, by his peers. People who did not stand in this relationship, and particularly those who served or attended him in various ways—like Keating his associate, his doctors and many simple people who knew him—remember him as invariably courteous, kind, thoughtful and warm.

Isaacs brought to the Bench habits of hard work which he had formed very early in life. An article in the *Lone Hand* for March 1909 reported the rumour that when the court was on circuit he would be in chambers before seven in the morning and most evenings as well. The article also acknowledged his massive learning and his preparation of his cases. 'Fortunate is the man,' said the writer, 'who can discover a relevant case that has escaped the keen

eyes of Mr Justice Isaacs.' His interventions in the course of argument in cases before the High Court pepper the pages of the reports. Sir John Latham, who made many appearances before him as counsel, spoke of his

> indefatigable industry and great legal learning. Counsel who appeared before him knew that all their arguments would be considered and that, whether they were accepted or rejected, full reasons would be given for the decision that was ultimately reached.[23]

Sir Owen Dixon, who often appeared as counsel in the High Court, has very interesting comments to offer on Isaacs from this standpoint:

> To argue as counsel against a view he had formed was an exercise amounting almost to a forensic education. Always courteous, never overbearing or assertive, he met you point by point with answers drawn by a most powerful and yet ingenious mind from an almost complete mastery of the facts and the law of the case. This sounds unjudicial and one sometimes felt it was: and yet if you were able to bring to his mind an aspect of the case or an argument which he had not seen and struck his mind as new to him and as having substance he would give it due consideration and sometimes change his opinion entirely. His industry was enormous and it was by unstinting work that he obtained a mastery of the facts of a heavy case and the law which appertained thereto.[24]

Isaacs' judgments reveal wholehearted commitment to positions, and often incredulity that there could be another view; they often read more like advocacy than judgment, and we have the testimony of Dixon that so it appeared to counsel as the case proceeded. But in this passage and on other occasions, Dixon has said that Isaacs could, in some cases anyway, be persuaded and moved from a point. But it required a strong mind and a powerful argument to do this. Other counsel, less charitably disposed, have recounted, as already noted, that Isaacs would play tricks with particular citations of authority, and it would then be found that he had the books in his possession. A very eminent Australian who appeared as counsel in those days tells that Isaacs might stop argument as unnecessary on a particular point, and then devote many pages of judgment to an elaborate discussion of that very point. His judg-

[23] 'Sir Isaac Isaacs' (1948) 22 Australian L.J. 66.

[24] Introduction to Gordon: Sir Isaac Isaacs.

ments contain copious citation of authority; not infrequently, as his brethren drily observed, authority which had not been cited to or canvassed before the court.

The High Court demands much of its judges, for the range of its cases and the ambit of its jurisdiction are very broad. Isaacs expounded the role of the court from the Bench:

> (This) Court is . . . the tribunal specially created by the united will of the Australian people, as a federal court and as a national court. It has very special functions in relation to the powers, rights and obligations springing from the constitution and the laws made under it—matters which concern the Commonwealth as the organization of the whole population of this continent, the States in their relation to the Commonwealth and to each other, and the people in their relation to the Commonwealth and to the States regarded as constituent parts of the Commonwealth. Besides those federal functions, this Court has by the constitution an appellate jurisdiction, which extends to the interpretation and enforcement of purely State laws, unrelated to any federal consideration. In this aspect, it is truly an appellate court for each State as if it were competently created for the purpose by State or Imperial legislation.[25]

What this means in practical terms may be illustrated by a catalogue of the matters dealt with in a single volume of the *Commonwealth Law Reports* selected at random and covering cases decided when Isaacs was a member of the court.[26] The cases decided included company and tax matters, questions relating to the construction of contracts and wills, evidence in a criminal case, negotiable instruments, insurance matters, the Dentists Act, the validity of a by-law under a Health Act, questions of negligence and contributory negligence, matters arising under the Customs Act, a question of the right of an owner of property to be heard before a demolition order was made affecting his property. The particular volume from which this partial catalogue of cases is taken happened to contain no major constitutional case, and at no time were such cases the main body of the court's work. The great constitutional cases tend to stand out, and Isaacs' work in this field was notable, but the fact is that those cases occupy only a comparatively small part of the court's time and energies. A High Court judge is called upon to adjudicate on issues covering an extraordinarily wide legal range, and it may well be that the qualities

[25] *Commonwealth v. New South Wales* (1923) 32 C.L.R. 200, at p. 209.

[26] 14 C.L.R. (1911-1912).

called for in a judge in the fields of what may be described as technical lawyers' law will have a character different from those which are called for in the interpretation of a constitution which, virtually in sketch form, assigns and restricts powers, functions and competence. In federal systems there are inevitably differences of viewpoint in approaches to constitutional adjudication, but there can surely be little doubt that something distinctive and imaginative is demanded of a judge in this role. As already noted, the earlier High Court judges came to their constitutional cases with a broad background in politics and with preconceptions about the character of the constitution, while their successors, or most of them, did not. It was very likely, perhaps inevitable, that men who had spent their lives in the daily practice of the law and who were appointed to the court because of their success at the Bar would come as judges to the problems of constitutional adjudication with an approach not very different from that which they made to the non-constitutional work of the court.

Isaacs had a great technical mastery of the law. The range of his knowledge and interests in the law was very great and his handling of case law, statutes and the technical material of the law was confident, comprehensive and very impressive. But he insisted that technique must serve broader ends of principle and justice, and he reiterated this theme from the Bench in constitutional and non-constitutional cases alike. He spoke of the

> flexibility of the common law and its capacity to adapt its principles to the changing circumstances of the life of the community no less than to that of the individuals who compose it. It is the duty of the Judiciary to recognize the development of the nation and to apply established principles to the new positions which the nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter. It is only when those common law principles are exhausted that legislation is necessary.[27]

Isaacs' constitutional doctrine will be explored in some detail in the following chapter. Such general statements as these give a broad indication of his approach to the interpretation of the constitution; he expounded the case for an expanding national power insistently

[27] *Commonwealth v. Colonial Combing, Spinning & Weaving Co. Ltd* (1922) 31 C.L.R. 421, at pp. 438-9.

and wholeheartedly, and not surprisingly his doctrines had their greatest influence in the court in the years which followed Griffith's and Barton's departure from the Bench.

His views on the flexibility of the common law and on the role of the judge were nowhere more characteristically illustrated than in his long, vehement and emotional dissenting judgment in *Wright v. Cedzich*,[28] late in his judicial career, in 1930. In that case, the court was called upon to decide whether a wife could recover damages against a woman who had enticed away her husband. The majority in the High Court held, on the authority of earlier cases, that they could not grant such a remedy. A husband had an action for the enticement of his wife, which was said to depend historically on his right to her services in which he had a proprietary interest, whereas the wife had no corresponding proprietary right and hence no action. Isaacs angrily rejected this doctrine and went back to medieval precept which roundly asserted the law's capacity for expansion. 'A writ shall be made, lest it might happen later that the Court should long time fail to minister justice to complainant.' This citation he followed by an underlined *A ruling to remember if courts are to be living organs of a progressive community.*[29] He traced the changes in the status of women who could now vote, enter most branches of professional and commercial life, hold property, sue and be sued, and serve as 'vital combatants' in the country's defence. In light of all this, it could not and must not be said that:

> *consortium* in point of law means on the part of the woman, her society and services (using those terms in the most unmeasured sense) and, on the part of the man, the one duty of cash remuneration in maintaining her, for which she may sue her husband directly if he fails to provide it. Sitting here, I decline to declare judicially that Australian wives occupy such a repellent position of legal and moral degradation.[30]

In other common law jurisdictions, including the highest English courts, the law has since been stated in Isaacs' terms, and it would be intolerable if it were not so.

In other branches of the law, he stressed the same general principle. In *Bourke v. Butterfield & Lewis Ltd*[31] for example, he discussed questions relating to industrial injuries. The question for the court was the want of care for his own safety that would debar

[28] (1930) 43 C.L.R. 493.
[29] at p. 515.
[30] at p. 506.
[31] (1926) 38 C.L.R. 354.

an employee from a remedy against his employer for breach of the employer's statutory obligation to keep dangerous machinery fenced. Isaacs stated his views, this time in agreement with his brethren.

> The court, no less than the parliament whose words we have to interpret, is a living organism of the same society, broadly conscious of its industrial activities and the evils intended to be met, and fully seized of the corporate sense of the community with regard to them. . . . It is common knowledge that in the modern factory system, the machine, with its elaborate complication and terrific force, demands from its human attendants not merely skill but ceaseless watchfulness and attention, involving constant strain of every sense and wear and tear of the nervous system. If, as I conceive, human life is to be the supreme consideration, then in those circumstances, the old balancing of the common law of reasonable care for employees' safety on the one side, and on the other, such reasonable conduct for self preservation as is expected in ordinary life where men meet on an equal footing, is a fallacious standard.[32]

Isaacs had a long continuing interest in factory legislation, dating back to his days in the Victorian legislature in the nineties. On this point, the law has since pursued a somewhat uncertain course, but Isaacs' approach to it shows a lively awareness of the significant factors and a determination to reach a sensible and just conclusion in light of them.

At times only legislative intervention could achieve what he regarded as a desirable social result, and in such cases he called for appropriate legislative action. In *Fremlin v. Fremlin*[33] he addressed himself to the Commonwealth parliament in calling for national legislation to put an end to the diversity of State divorce laws. Almost half a century passed before this call was heeded. In *Cofield v. Waterloo Co. Ltd*[34] he called the attention of State legislatures to the trivial money penalties for breaches of Acts relating to the fencing of dangerous industrial machinery.

> That is, of course, the responsibility of parliament, but, in fairness to parliament itself, and in justice to the helpless employees who are unnecessarily exposed to imminent risks, the occasion warrants the serious attention of the Legislature being drawn to the matter.

On another occasion he drew the attention of parliament to the difficulties of effectively policing State Health Acts.[35]

[32] at p. 369.
[33] (1913) 16 C.L.R. 212.
[34] (1924) 34 C.L.R. 363, at p. 371.
[35] *Houston v. Wittner's Pty Ltd* (1928) 41 C.L.R. 107, at p. 112.

In such cases, Isaacs' judgments reveal a strong concern with the social implications of the issue before the court. This coloured his views on the binding effect of earlier decisions, and on various occasions he insisted that the decisions of his own court were not inexorably binding on it. Characteristically he spoke not of the right, but of the duty to reject erroneous precedent.

> Our sworn loyalty is to the law itself. . . . If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the court should be persistently wrong than that it should be ultimately right.[36]

This was coupled with an insistence that cases should not be 'stifled' by technicalities.[37] This was not to say that authority and technical doctrine were not the most welcome support when they advanced the argument which Isaacs was developing in his judgments, for there was no judge more given to heaping authority upon authority and developing subtle distinctions on due occasion.

In serious criminal cases he was insistent in emphasizing the protections which the law afforded to accused persons, and he insisted that they were entitled to all the technical protections of the common law. His view of the role of the High Court as a criminal appeal court underwent some change. In 1907 he concurred in a judgment of Griffith which declared that the High Court would follow Privy Council practice in exercising extreme caution in granting leave to appeal in criminal cases.[38] Two years later, when the majority in the court followed that course in refusing leave to appeal in a case in which it was argued that the accused had been prejudiced by the wrongful admission of evidence, Isaacs had further thoughts. In dissenting, he said:

> Where it is a case of life or death, nothing in the shape of a technicality should stand in the way of giving a person sentenced to death an opportunity of preserving his life.[39]

[36] *Australian Agricultural Co. v. Federated Engine Drivers & Firemen's Association of Australasia* (1913) 17 C.L.R. 261, at p. 278.

[37] See, for example, *Cloverdale Lumber Co. Pty Ltd v. Abbott* 34 C.L.R. 723.

[38] *McGee v. The King* (1907) 4 C.L.R. 1453.

[39] *Hope v. The King* (1909) 9 C.L.R. 257, at p. 259

He developed this doctrine, again in dissent, in the *Colin Ross Case*. This was the *cause célèbre* of its time: Colin Campbell Ross was charged, convicted and executed early in 1922 for the murder of a young girl in Melbourne. There was a vast amount of publicity, highly prejudicial to Ross, who was convicted largely on the statements of two doubtful persons. Ross's counsel, T. C. Brennan, subsequently wrote a book, *The Gun Alley Tragedy*, in which he argued with great passion that Ross had been the victim of a gross miscarriage of justice. The High Court, with Isaacs dissenting, refused special leave to appeal. The majority held that the High Court had an unfettered discretion to grant special leave to appeal from the Supreme Court of a State in any criminal case where special circumstances were shown to exist, but that this case did not disclose such circumstances. Isaacs stated the role of the High Court in such cases in the broadest terms:

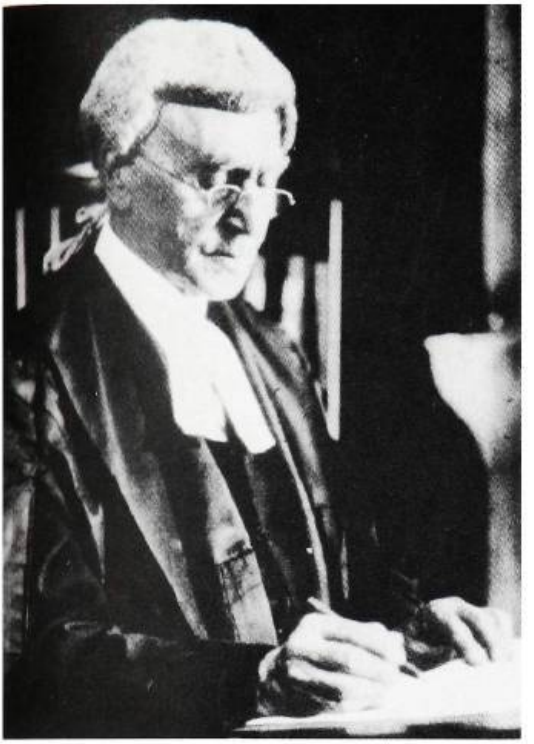
> We have to bear in mind some fundamental truths as to our own duties. First, we are sitting as an Appellate Court of Criminal Appeal constituted by the will of the Australian people, not only for federal matters, but as truly representative of each State as its own Supreme Court to guard and maintain its laws, to protect the weak and to punish aggressors, but at the same time to see that no person is called on to suffer punishment except in substantial accordance with law. It follows that an Australian citizen does not approach this court, in either civil or criminal matters, as a suppliant asking for intervention by way of grace—as in the Privy Council. He comes with a right to ask for justice, and I hold, as I have fully stated on a former occasion, that our sole duty in such a case is to see whether justice to him requires an appeal to be allowed. Any other view is, in my opinion, contrary to the basic conception of the constitution as to the judicial power in Australia.[40]

Isaacs held that the trial judge had not adequately instructed the jury on an alternative verdict of manslaughter and that in a case where a man was on trial for his life this was sufficient ground for granting leave to appeal. But he made it clear that apart from this he would not have disturbed the jury's verdict.

Isaacs' broad conception of the criminal appeal jurisdiction of the court did not always work in favour of accused persons. In *Snow's Case*, in dissent, he was of opinion that leave to appeal should be granted against the *acquittal* of Snow by direction of the trial judge. In *Lloyd v. Wallach*[41] he held that an appeal lay to the

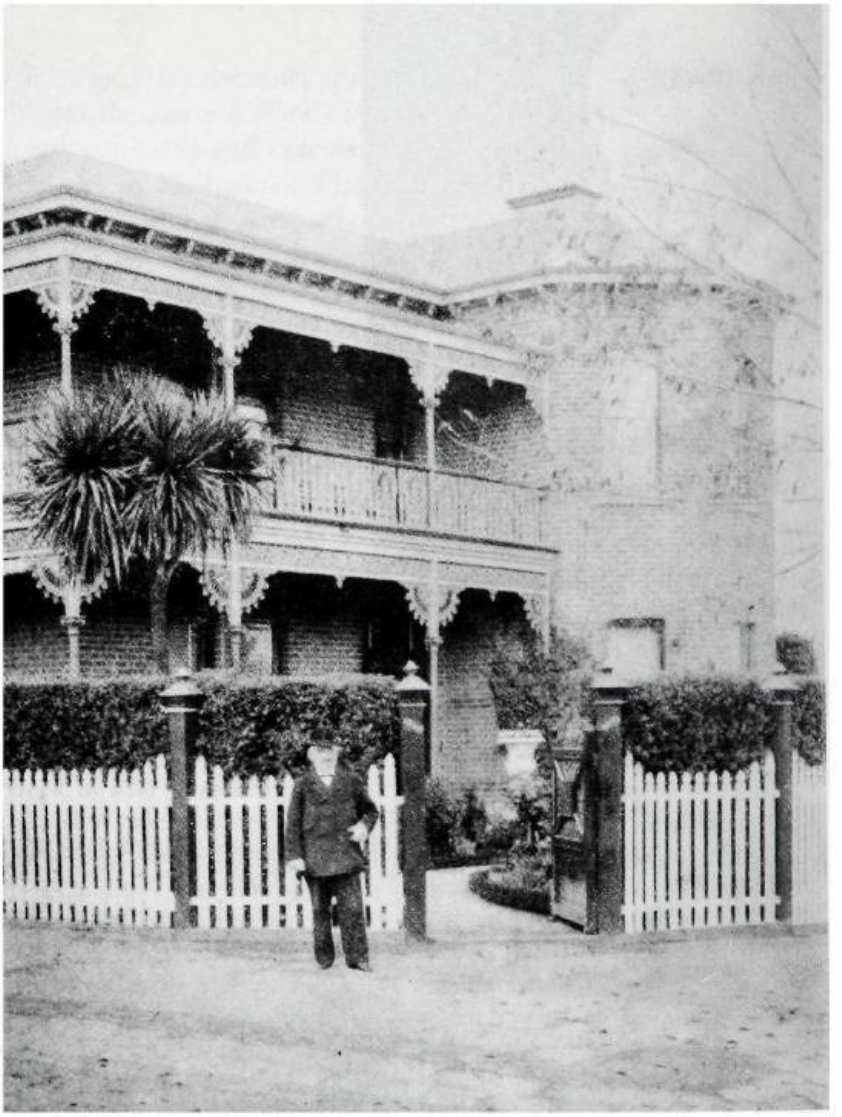
[40] (1922) 30 C.L.R. 246, at p. 249.

[41] (1915) 20 C.L.R. 315.

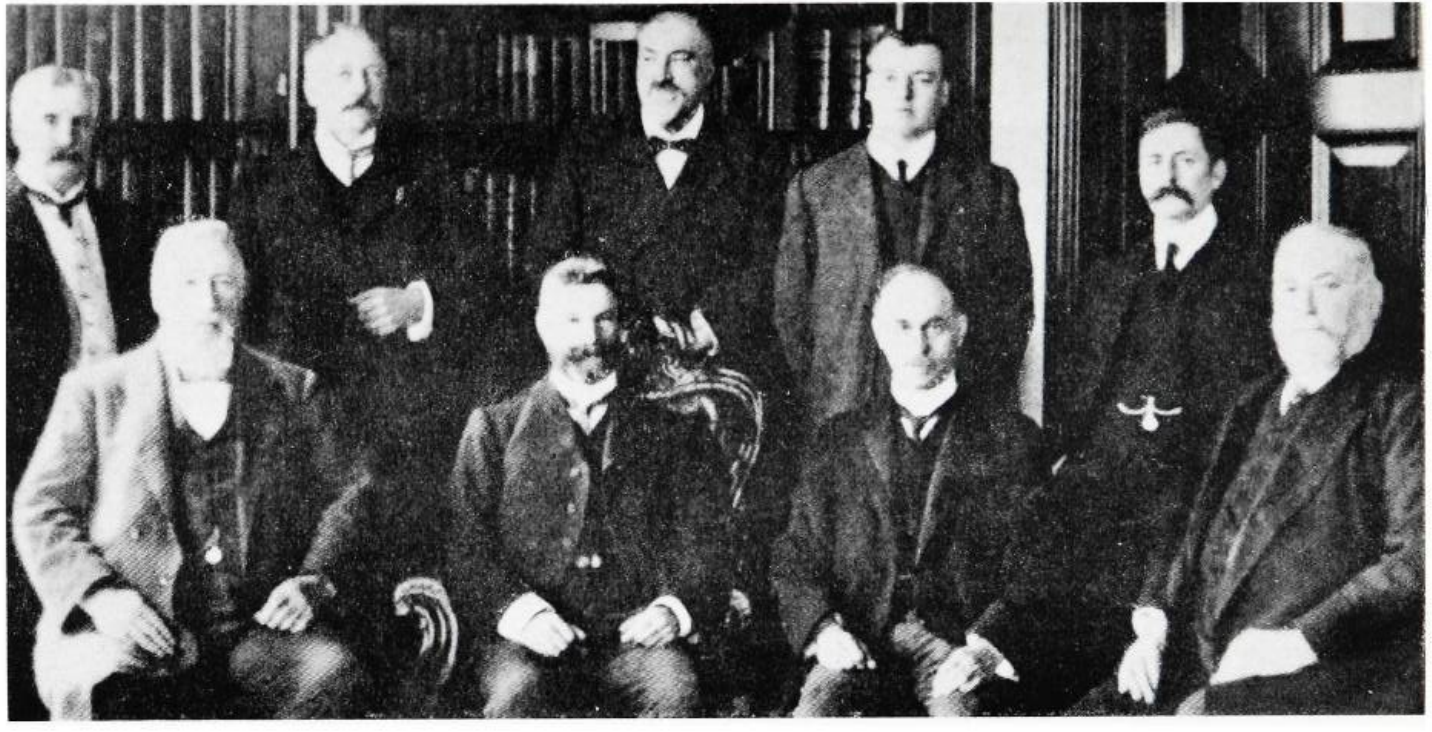


Mr Justice Isaacs

Isaacs' parents: Alfred and Rebecca Isaacs

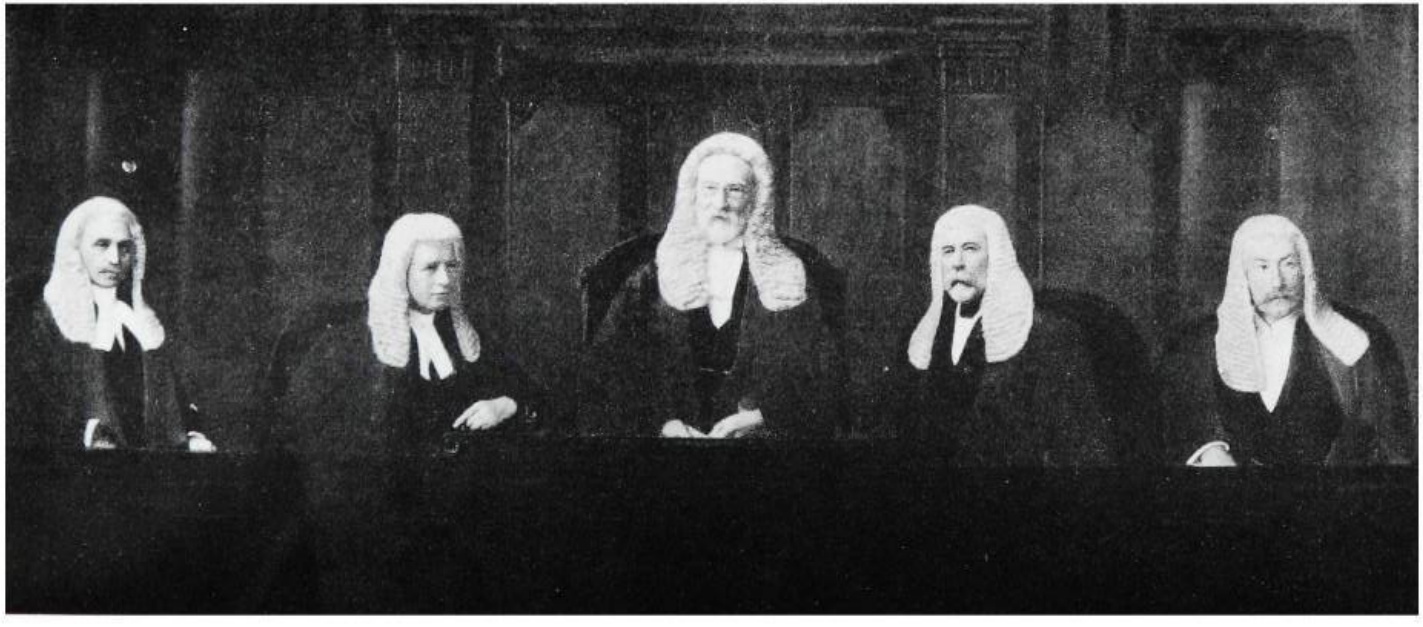


The family house at Number 1, Goodall Street, Auburn



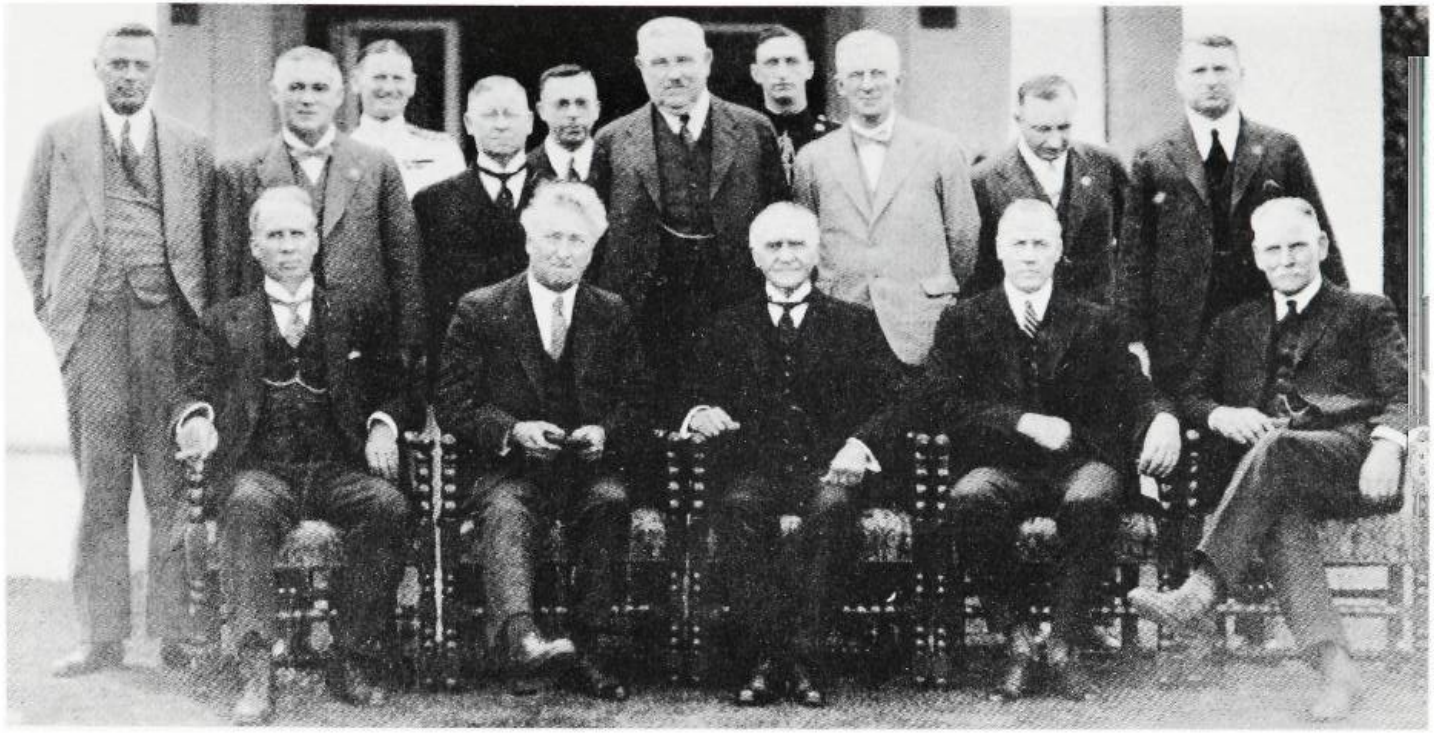
Attorney-General in the second Deakin Administration, 1905-6

T. T. EWING AUSTIN CHAPMAN T. PLAYFORD J. H. KEATING LITTLETON GROOM
W. J. LYNE ALFRED DEAKIN ISAAC ISAACS JOHN FORREST



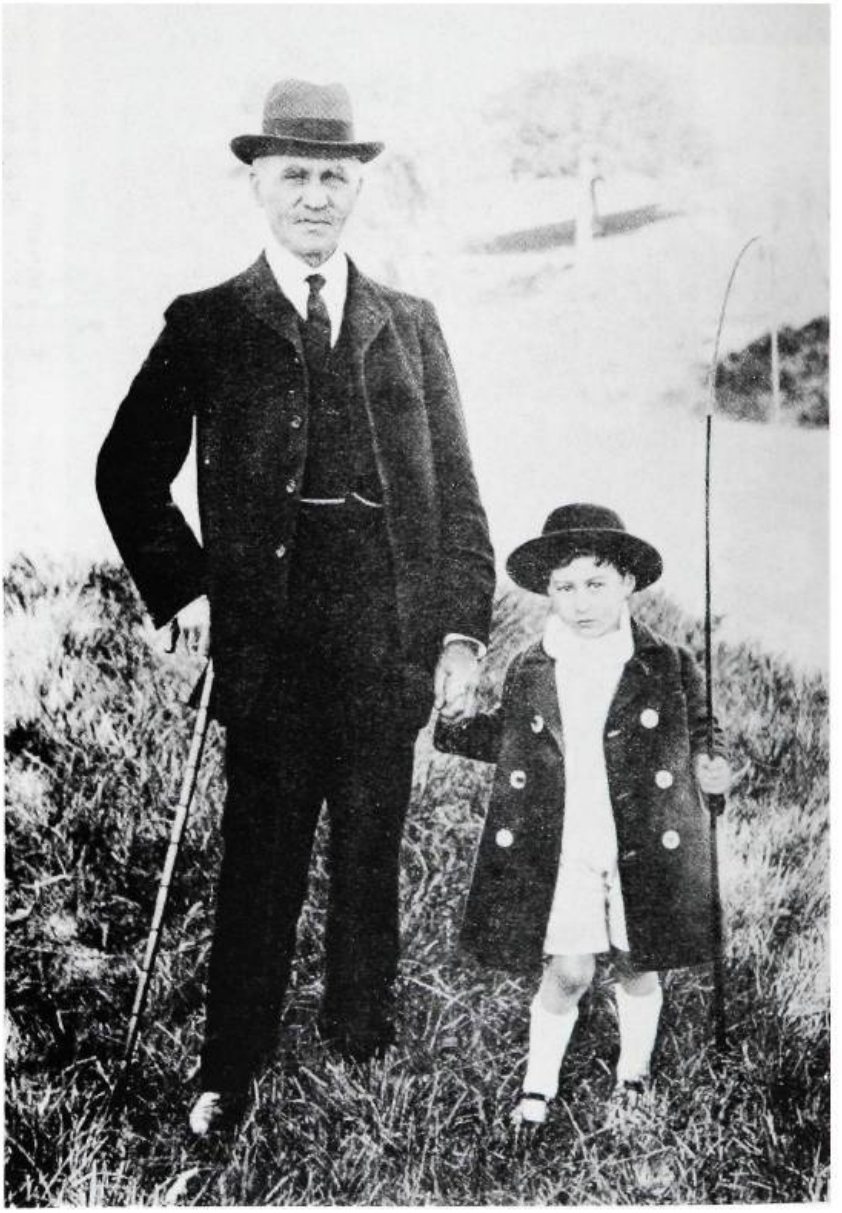
The first five judges of the High Court

ISAACS BARTON GRIFFITH O'CONNOR HIGGINS

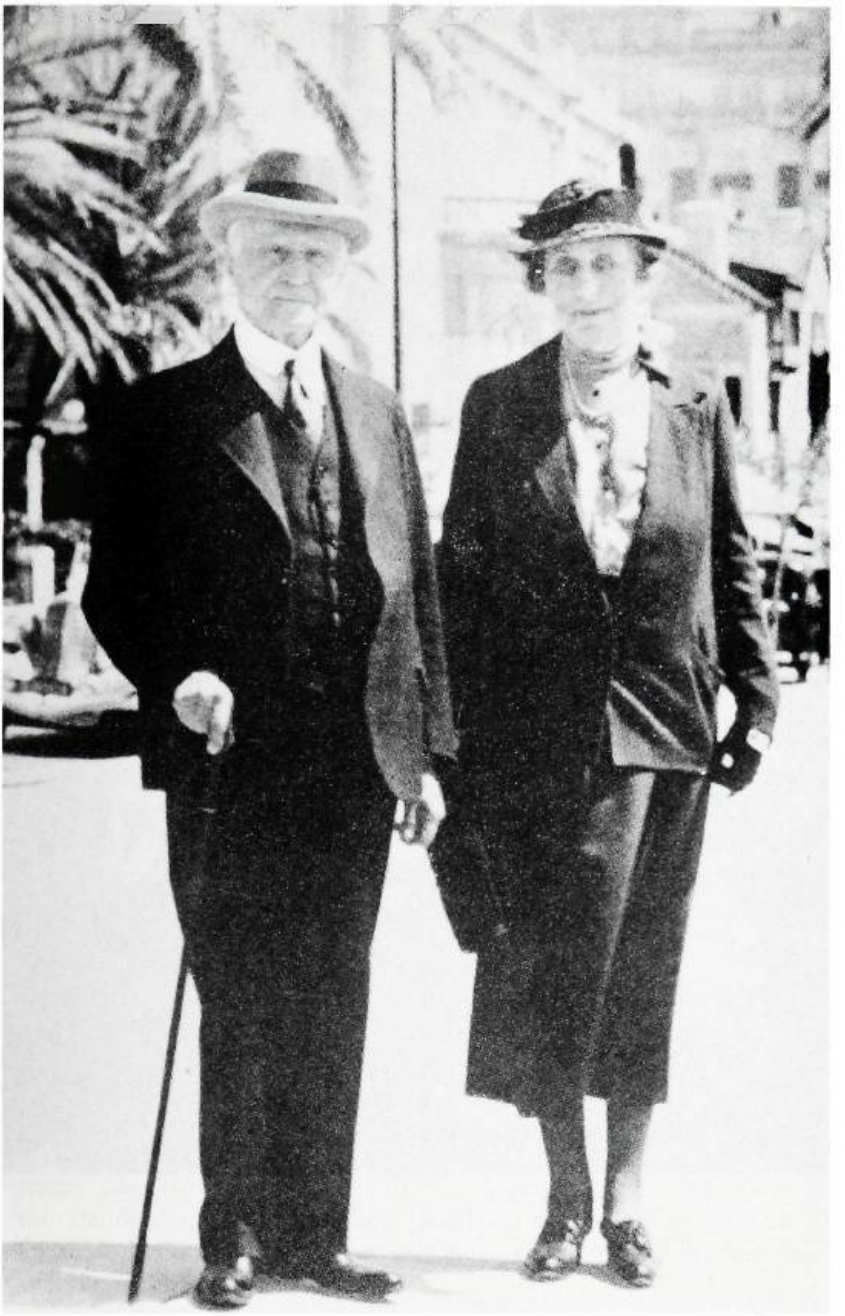


Governor-General with Ministry, 1932

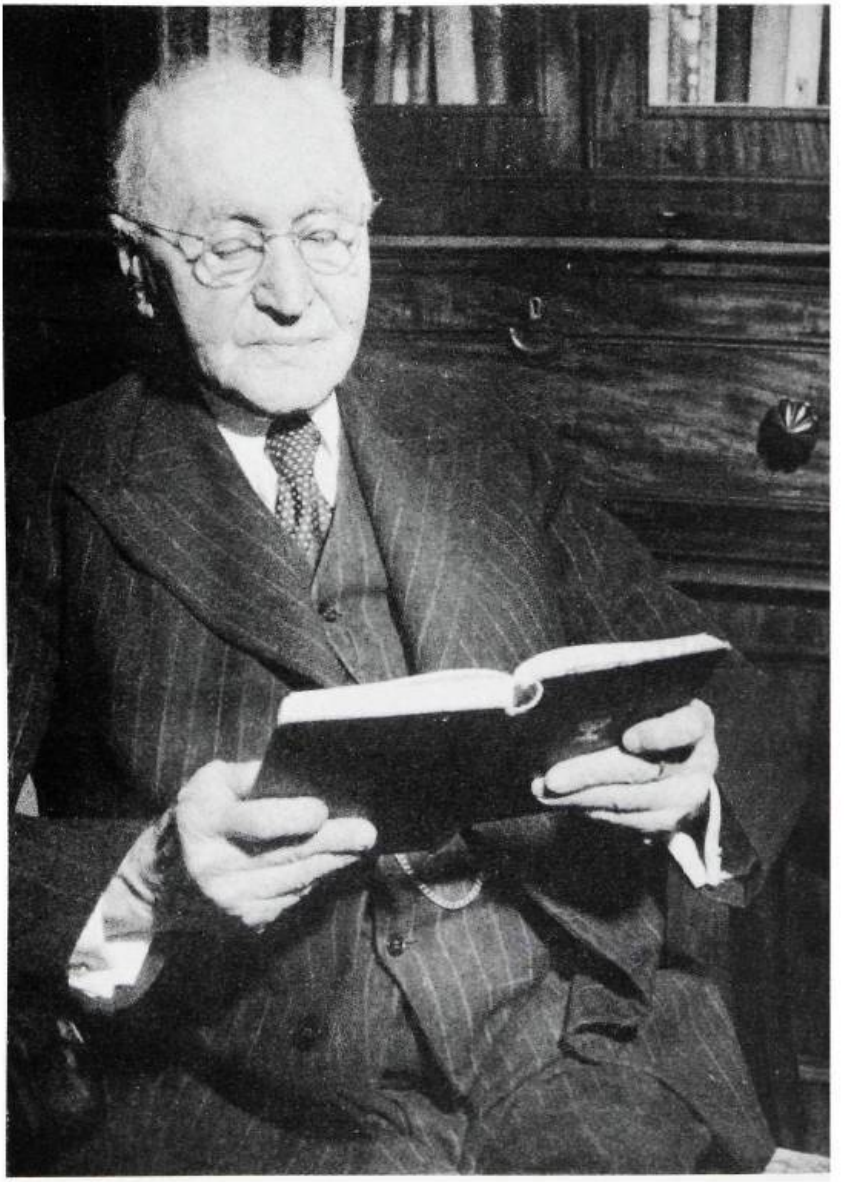
J. A. PERKINS C. W. C. MARR R. ARCHDALE PARKHILL A. J. McLACHLAN H. S. GULLETT C. A. S. HAWKER JOSIAH FRANCIS
G. F. PEARCE J. A. LYONS (PRIME MINISTER) ISAAC ISAACS J. G. LATHAM J. E. FENTON



With his grandson, Tom Cohen, in 1915



Isaacs and Lady Isaacs



In old age

High Court against an order of the Supreme Court of Victoria discharging a person from custody on a writ of habeas corpus. This involved departure from the English rule that an order setting a man free on habeas corpus proceedings was final and not subject to appeal, and Isaacs said that whatever the English position might be, the appellate jurisdiction of the High Court was conferred in the most general terms. On the substantive issue in the case, Isaacs agreed in holding that Wallach was lawfully detained under the War Precautions legislation by order of the minister. Both *Snow* and *Lloyd v. Wallach* were wartime cases, one arising under the Trading with the Enemy legislation and the other testing the scope of executive discretion to order the detention of naturalized persons suspected of disaffection or disloyalty, and in such cases Isaacs, an ardent nationalist, asserted the broadest operation of national power. As he said in *Farey v. Burvett*,[42] the most important of the first world war cases, the defence power of the Commonwealth was 'the pivot of the constitution because it is the bulwark of the nation. Its limits then are bounded only by the requirements of self preservation' and in giving effect to this he showed no awareness of competing claims of individual liberty.

Isaacs' judicial philosophy also revealed a strong sympathy for the administrative problems of government. So, in the context of the procedural rights of individuals charged with offences he drew a distinction between 'crimes such as murder, or arson etc.'[43] and public order offences, such as the sale of adulterated milk under State Health Acts, where, in his view, standards of proof were less demanding. He was very sensitive to the difficulties of policing and proving these offences, and in such cases found himself at times in solitary and angry dissent. 'This case,' he said in one instance,

> relates only to a pint and a half of adulterated milk and yet from the standpoint of human life, and particularly infant life, it is far more important than many other cases that receive the sustained attention of this court.[44]

In that case he was prepared to accept, as *prima facie* evidence of commission of the offence of selling adulterated milk under a State

[42] (1916) 21 C.L.R. 433, at p. 453.

[43] *Houston v. Wittner's Pty Ltd* (1928) 41 C.L.R. 107, at p. 114.

[44] ibid, at p. 112.

Health Act, evidence which the majority in the court convincingly showed was not adequate. As Higgins said:

> I fully concur with my brother Isaacs as to the far-reaching importance of this case, and as to the lamentable result if such legislation as this should not be enforceable; and it may not be amiss to remark that the practical difficulty which faces prosecutors under the Health Act could be met by a legislative amendment that a name on a cart shall be *prima facie* evidence of the ownership, and that a person driving shall be deemed to drive as servant of the owner unless the contrary be proved.[45]

But until that was done, it was not possible to convict on such evidence.

Isaacs' anger at a result which, in his view, defeated the policy of legislation, at times led him into flights of rhetoric and extravagant analogy. In *Matthews v. Foggitt Jones Ltd*[46] the question for the court was whether the introduction of sausages into a particular area was an offence against a State statute prohibiting the bringing into that area of 'the carcase or any part of the carcase' of any animal slaughtered outside that area. The majority held that a sausage did not answer that description, and Isaacs dissented at length, pointing to the threat to the people of New South Wales.

> This case . . . is a test case involving serious consequences, affecting not merely the health but even the lives of a very large portion of the population of the State of New South Wales.
>
> I am not able to dispose of it on any technical distinction between a sausage and the component parts of a sausage. Nor do I agree that the question of the nature of the contents did not arise. . . . What is called a sausage consists of comminuted meat which, for convenience, is enclosed in a portion of the animal's intestine. If there were a penalty for bringing in an intestine or any portion of an intestine, I should be unable to exonerate a defendant who brought it in as the external envelope of a sausage. If the internal portion of the sausage is itself before envelopment portion of a carcase, I utterly fail to see how the mere fact that it is covered with an intestine makes it cease to be what it was immediately before it was covered. Its identity remains, just as much as the identity of a man remains whether he is called a soldier in uniform, a barrister in robes or a cricketer in flannels.

The case, not surprisingly, attracted public attention and was the subject of a newspaper cartoon and a columnist's rhyme:

[45] at p. 127.

[46] (1925) 37 C.L.R. 455, at pp. 458-9.

In every sausage that you eat
P'raps 10 per cent is really meat
Or so it's been computed.
But with His Honor I agree,
In sausages this meat must be
Correctly comminuted.

His Honor's recipe, you note,
Provides for sausages a coat—
If they are to be snapped up.
And every sausage has its dress
No matter what's inside I guess
In mystery it's wrapped up.

The columnist also surmised that Isaacs' judgment was delivered with 'dry humour', but his surmise was almost certainly wrong on that point.

Isaacs had little sympathy with the claims of individuals who in conflict with local governmental authorities alleged a disregard of procedures specified by law or a want of good faith. In *Sandringham Corporation v. Rayment*[47] he dissented from the court's holding that the council could not recover roadmaking charges from a property owner because it had failed to comply with the notice requirements in the Act. In Isaacs' view such a defence was unmeritorious; the road was in a 'deplorable state', the property owner had had the direct benefit of the work and had incurred an obligation to pay his 'just proportion' of the cost. The defence was characterized as 'a contention which I think may fairly claim to have reached almost the highwater mark of technical formality to the denial of plain justice'. *Werribee Council v. Kerr*[48] was a more striking illustration of his attitude. The council had authorized an oil company to lay pipes across land which in error included Mrs Kerr's private property, and she secured a court order for their removal. Then, at the suggestion of the oil company, the council proposed compulsorily to acquire the land along which the pipes ran for the purpose of providing a public road. The court, over Isaacs' dissent, held that this was a sham purpose and that the council was acting to protect the existing position of the company, and not *bona fide* to provide the road. The majority view was stated very plainly by Starke J.: such a body as a local council,

[47] (1928) 40 C.L.R. 510, at pp. 517-18.

[48] (1928) 42 C.L.R. 1.

invested with powers for a particular purpose, would not be permitted to exercise those powers for different purposes and, on the question of fact, he was satisfied that there was no genuine intention to open a road. Isaacs assailed this 'unprecedented and serious interference with municipal government'; he denied the right of the court to substitute its own judgment of purposes for that stated by the local authority, and he categorically rejected any suggestion that the council was acting in bad faith. Isaacs, of course, was identifying bad faith with actual dishonesty, whereas the majority saw the case as involving the use of power for a purpose other than that for which it was conferred. At bottom, Isaacs' attitude was expressed in his statement that:

> injustice can arise only by leaving absolutely uncontrolled in the respondent's hands the power of demanding not simply the value of her property but a price measured by the company's necessity and that would leave the municipality without the road it desires and apparently needs.[49]

It has been a criticism of common law judges that they have viewed too narrowly and unsympathetically the problems of government and administration, and the criticism has substantial justification. But in these particular cases, it is difficult to accept Isaacs' position. In its relations with individuals, governmental authority must scrupulously respect the procedures specified by the law, and it can scarcely be the right course to disregard departures from those procedures, even though accidental, as Isaacs did in the first of these two cases. In the *Werribee Council Case* it is clear that the council had initially made a mistake which cost the company dear, and the council was ready and willing, at the prompting and at the expense of the company, to take action to save the company from heavy expense and inconvenience. To view the situation from the standpoint that the individual was not paying his just share in the one case, and that Mrs Kerr was holding the company to ransom in the other, obscures issues which are much more complex and which raise much more fundamental questions about the relations of individuals and government than Isaacs would allow.

The High Court is primarily an appellate court, and it was as an appellate judge therefore that Isaacs did most of his judicial work. But the High Court is also invested by the constitution and

[49] at p. 29.

by Commonwealth legislation with an extensive original jurisdiction —certainly a much broader original jurisdiction than its federal counterpart, the Supreme Court of the United States. In this jurisdiction the High Court tries cases at first instance and normally, though not invariably, the original jurisdiction is exercised by a single judge. Isaacs sat in the original jurisdiction of the court in a variety of cases which included industrial property matters, customs cases and diversity cases. The diversity jurisdiction is an anomalous one: an action, however trivial the matter in issue, may be brought in the original jurisdiction of the court in cases where the parties are residents of different States of the Commonwealth. This was copied from the American constitution, though there such matters were not within the original jurisdiction of the Supreme Court of the United States, but matters of federal jurisdiction and within the original jurisdiction of lower federal courts, which have had no counterpart in Australia. Whatever reason there was for such a provision in the American constitution, it made no sense in the Australian context and it was roundly criticized by Australian High Court judges in the main case in which it was considered by the High Court.[50] Isaacs was a member of the court in that case, but did not join in the criticism. On the contrary, he dissented vigorously and at length from the majority decision which held that a corporation could not be a resident for the purposes of establishing the diversity jurisdiction of the court. Isaacs argued that residence was attributed to corporations for various legal purposes, and that there was no reason why it should not be attributed for this purpose. He may have had the better of the reasoning and the authority, but the majority opinion produced the practical and satisfactory result that the diversity jurisdiction was considerably restricted. Isaacs, characteristically, never accepted the majority decision and almost twenty years later, long after he had left the court, proposed, as one of a number of desirable constitutional amendments, one which would have specifically extended the original diversity jurisdiction of the court to include corporations. This, he said, would

> fill up an anomalous gap declared by a decision of the High Court . . . that has caused some inconvenience to business men, and is

[50] *Australian Temperance & General Mutual Life Assurance Society Ltd v. Howe* (1922) 31 C.L.R. 290. See Cowen: Federal Jurisdiction in Australia (Oxford University Press 1959) at pp. 74ff.

certainly out of tune, a discord for which no sensible reason can be found.[51]

What inconvenience it caused is not very obvious, and why Isaacs with his concern for the social justification of legal rules should have considered the matter of sufficient importance to warrant remedial constitutional action is certainly unclear.

One of Isaacs' most notable and impressive judgments was delivered in the exercise of original jurisdiction. This was the *Coal Vend Case*[52] and, in Isaacs' words 'the trial lasted seventy-three days and besides its duration, was exceptional in its character, partaking necessarily to a great extent of the nature of an investigation'.[53] Isaacs' judgment did justice to the complexity and detail of the issues and extended over 270 pages of the *Commonwealth Law Reports*. In the event, his judgment was reversed on appeal by the Full High Court whose decision was later sustained by the Privy Council.[54] This litigation, to which brief reference was made earlier,[55] was the first and indeed the only real test of the anti-monopoly provisions of the Australian Industries Preservation Act which had passed into law while Isaacs was Attorney-General. The Act conferred original jurisdiction on the High Court to try cases arising under it, and in this case, the Crown alleged offences under the Act which were said to consist in entering into a contract and combination with intent to restrain the interstate trade in Newcastle and Maitland coal to the detriment of the public and in monopolizing or attempting to monopolize and in combining and conspiring to monopolize the interstate trade and commerce in Newcastle and Maitland coal with intent to control to the detriment of the public the supply and price of coal.

The Vend was a combination of colliery owners who produced a very substantial proportion of the coal mined on the northern fields of New South Wales and exported interstate. It was formed in 1906 after less successful attempts at combination, and the agreement between its members regulated and controlled the production of

[51] Isaacs: Australian Democracy and Our Constitutional System (1939) at p. 40. See also p. 37.

[52] *The King & A.G. of the Commonwealth v. Associated Northern Collieries & Others* (1911) C.L.R. 387.

[53] at p. 399.

[54] (1912) 15 C.L.R. 65; [1913] A.C. 781 (P.C.).

[55] see pp. 104-5 above.

coal on their fields. The Vend entered into a shipping agreement with a group of five shipping firms under which the Vend agreed to sell exclusively to the shipping firms the whole of the coal required for interstate sale, and the shipping firms agreed to buy exclusively from the Vend the whole of their interstate requirements of coal. Isaacs held that the charges were made out against the defendants and imposed fines and granted an injunction restraining the defendants from continuing the offences. There was no doubt about the fact of combination or of the fact that it restricted trade, and the critical questions were, under the terms of the Act, whether the contract was *prima facie* evidence of intent to cause public detriment, and whether such an intent could be inferred from the course of action followed by the defendants subsequent to the agreement. Isaacs answered these questions affirmatively. He was called upon to explore many issues, including definitions of the public interest, which he identified primarily with the interests of consumers, and of monopolization, the core of which in his view was the purposive elimination of effective competition.

The Australian legislation bore comparison with the American Sherman Act and the Supreme Court of the United States gave important decisions on that Act while Isaacs was hearing the *Coal Vend Case*. But the Sherman Act differed significantly from the Australian Act as then drafted, in that it did not require proof of intent to restrain trade or commerce to the detriment of the public, although the American decisions of 1911 introduced qualifications into the operation of the Sherman Act which certainly did not appear on its face. But the specific reference to public detriment in the Australian Act made the task of judgment very difficult and Isaacs, in considering the Crown argument that the combination raised prices excessively and unreasonably so that there was a detriment to the public, investigated the matter with great care. He agreed that price increases might be demanded in the public interest, viewed from the standpoint of wage levels, industrial stability and productive continuity, but he concluded that the price rise which had taken place was higher than was justified by these considerations, and that the excess was accordingly a detriment to the public.

The Full High Court, after a long hearing occupying seventeen sitting days, reversed Isaacs' decision in a single judgment, delivered by Griffith. As one writer has put it: 'a complex problem of accounting and industrial analysis is virtually dismissed in precisely four

pages of naïve economic reasoning'[56] and this was even more true of the subsequent decision of the Privy Council sustaining the judgment of the Full Court. The inadequacy of the economic analysis in the appeal court is confirmed by a recent study of federal control of monopoly in Australia where the author, an economist, writes:

> Had the judgment of the trial judge been upheld in [the *Coal Vend Case*] Australia might have entered a period of anti-monopoly enforcement not unlike that of the United States. There would have been a profound effect on political and business thinking and the community as a whole would have been forced to face the problem of social policy towards monopoly with a much greater awareness of the issues involved. It might even have led to the formulation of a social philosophy positively favouring competition rather than nationalization or other forms of government control.[57]

The *Coal Vend Case* revealed Isaacs at his best, with an awareness and a grasp of complex and difficult issues, and a capacity for economic analysis far greater than was possessed by the judges whose views ultimately prevailed in the High Court and the Privy Council. But with the reversal of Isaacs' judgment the attempt to control monopolies and combinations in restraint of trade through the Australian Industries Preservation Act was given up for many years.[58]

On other occasions, Isaacs dealt as a member of the court with restraint of trade questions, though on these occasions in a common law context. To such cases, as indeed to the wide range of cases on matters of common law and equity which came before the court during his long term on it, he brought his characteristic capacity for elaborate and detailed analysis of facts, law and cognate materials where relevant. There is little point in tracing out the detail of doctrines in the various areas of the law which fell to him for judgment, and the development of his constitutional doctrine will be separately considered. One characteristic quality of his judgments was their conviction of rightness; *a fortiori* when he was a dissenter. Thus in one case: 'my mind is utterly unable'

[56] P. D. Phillips in Else-Mitchell: Essays on the Australian Constitution (Law Book Company of Australia, 2nd edn, 1961), at p. 150.

[57] D. J. Stalley: 'Federal Control of Monopoly in Australia', 3 University of Queensland L.J., at p. 259.

[58] see pp. 104-5 above.

to accept a particular contention;[59] in another: 'Every inch of the rule as I have stated it is in my opinion covered by authority.'[60]

On a number of occasions and in varying contexts of public and private law the Privy Council on appeal from the High Court acknowledged the power and force of Isaacs' judgments. He himself was sworn of the Privy Council in November 1921, when he was in England, though he did not become a member of the Judicial Committee of the Privy Council until 1924. On 8 November 1921, a few days before he was sworn a Privy Councillor, he wrote to Mr Churchill who was then Secretary of State for the Colonies. Isaacs kept a copy of this letter.

Hans Crescent Hotel,
Belgravia
London S.W.1 November 8, 1921

Dear Mr Churchill,

Your many public cares have I am sure prevented you from communicating with me with reference to our interview of a month ago.

But as I am making arrangements to leave England in a very few weeks, you will I trust forgive me if I venture from a purely public standpoint to encroach for a moment on your time.

Since my arrival in England several months ago I have been delighted to see the Supreme Courts of Canada and New Zealand represented by Judges of those distinguished tribunals in the actual work of the Judicial Committee. Indeed Canada has two judges on the Committee both of whom, as I understand, have recently participated in judicial hearings.

Australia however has been entirely unrepresented. Having regard to the position in which I find myself, I hope I shall not be misunderstood if I draw your attention to a consideration that appears to me somewhat important.

Would it not be a matter for sincere regret from more than one point of view if the opportunity should be entirely lost of according to the Court to which I have the honour to belong, some practical recognition of its equal importance with the great tribunals of the Empire?

I am
Yours faithfully,
I. A. Isaacs.

[59] *Young v. Tibbits* (1912) 14 C.L.R. 114, at p. 140.

[60] *Varawa v. Howard Smith & Co.* (1911) 13 C.L.R. 35, at p. 80.

It was rather a tricky letter to write, though the point was undoubtedly sound, and Isaacs would have had less difficulty in writing it than most. It may be that the failure of later proposals to turn the Privy Council into a genuinely Commonwealth court is explained in part anyway by the fact that they came too late; that it remained for too long a tribunal with too little Commonwealth (and non United Kingdom) representation. Isaacs was an ardent nationalist and imperialist, and the notion of Australian representation on the Judicial Committee of the Privy Council greatly appealed to him. Knox and he were both appointed to the Judicial Committee. At the same time, throughout his career, he emphasized the importance of controlling appeals to the Privy Council, at least on distinctively Australian matters. This emerged in his speeches as a private member of the Commonwealth Parliament in the debates on the Judiciary Bill in 1903, when he spoke somewhat critically of the Judicial Committee.[61] Early in his judicial career, in 1907, in *Baxter's Case*[62] he supported the view that the High Court was not obliged to follow the recent decision of the Privy Council in *Webb v. Outrim*,[63] or in any case which fell within the ambit of section 74 of the Commonwealth constitution, because the policy of the constitution was to preserve High Court control in such matters.[64] He agreed however in the *Royal Commissions Case*[65] in 1912 that a certificate should be granted allowing an appeal to the Privy Council. In that case, in an equally divided court, he was, by reason of Griffith's prevailing vote, a dissenter. Indeed, he appears to have kept an open mind on section 74 cases; in one of the last certificate applications on which he sat, he used language which suggested that there might be appropriate cases for the grant of a certificate.[66] Opinion hardened on this matter after he left the Bench, and while the court has not said that a certificate will invariably be refused, it is not easy to envisage a case in which the court would now grant it.

It was Isaacs, however, who gave the lead to the court in upholding the validity of section 39(2)(a) of the Judiciary Act which was designed to exclude appeals as of right to the Privy Council in a wide range of cases in which State courts were exercising federal jurisdiction. This is an extremely technical and difficult area of

[61] See p. 87 above.

[62] (1907) 4 C.L.R. 1087.

[63] [1907] A.C. 81.

[64] see p. 108 above.

[65] (1912) 15 C.L.R. 182. See p. 109 above.

[66] *Ex parte Nelson* (No. 2) 42 C.L.R. 255, at p. 265.

the law, which need not be explored in detail here. It suffices to say that the policy of the Judiciary Act was to shut out the appeal in such cases, and that in *Webb v. Outrim*[67] the Privy Council said that the clause was invalid so far as it purported to do so. In *Baxter's Case*,[68] which came before the High Court shortly thereafter, the court, including Isaacs, did not question the Privy Council view on this point, and in 1921, when Isaacs was on leave, the High Court in *Lorenzo v. Carey*[69] took the same view. But a few years later Isaacs held that section 39(2)(a) was valid and could exclude appeals as of right to the Privy Council, and he drew on arguments based on the evolution of Dominion status to support the conclusion that the Commonwealth parliament was authorized to make such laws dealing with the distinctively Australian question of judicial appeals.[70] Isaacs' reasoning in these cases has been said by one of Australia's foremost constitutional lawyers to bear 'all the marks of judicial legislation . . . [but] . . . the grasp of principle is sure and the application, though unexpected, does not seem . . . either strained or unconvincing'.[71] As a practical matter, these decisions (in which Isaacs was in the majority) have settled the law on this point.

As a judge, whether in the majority or as a dissenter—and there were many dissents—Isaacs was often, too often, long-winded and diffuse. His enormous energy, his conviction of the rightness of his reasoning and his conclusion, and his often didactic determination to set it all out, produced judgments of great and disproportionate length. He was aware of criticism on this score, and he wrote to his daughter Marjorie in 1934 when he was Governor-General:

> Mother sometimes thinks my letters are long. Some of my old colleagues used to suggest my judgments were long. But my view in both cases turned out to be right. I never say anything for the purpose of saying something, but I never omit saying anything that I think deserves for its own sake to be said.

This is absolutely in character. Of course, the criticism was sound:

[67] [1907] A.C. 81.

[68] (1907) 4 C.L.R. 1087.

[69] (1921) 29 C.L.R. 243.

[70] *Commonwealth v. Limerick Steamship Co. Ltd* (1924) 35 C.L.R. 69; *Commonwealth v. Kreglinger & Fernau Ltd* (1926) 37 C.L.R. 393. See Cowen: Federal Jurisdiction in Australia, at pp. 169ff., where this matter is dealt with in detail.

[71] K. H. Bailey: 'The Federal Jurisdiction of State Courts' (1941) 2 Res Judicatae, at pp. 186-7.

there was too often little discipline in his style, and his detailed discussions of facts, his review and citation of authority were often unnecessarily protracted. His characteristic method of judicial exposition was to develop the case with a series of italicized headings under which he examined and expounded the major factors and issues as he saw them.

His style was often that of an advocate; indeed the judgments not infrequently read like vigorous, not to say vehement, forensic arguments. Reference has already been made to his dogmatism; and sometimes he backtracked from one dogmatic conclusion to its dogmatic reversal. The operation of section 92 of the constitution upon Commonwealth legislation and activity—and the evolution of his views on this clause will be examined in the following chapter[72]—illustrates this very well. Again in *Mainka v. Custodian of Expropriated Property* the question was whether an appeal lay from the Central Court of New Guinea to the High Court. To Isaacs the answer was clear.

> The appellate power of this court under sec. 73 of the constitution extends to 'all judgments, decrees, orders and sentences . . . of any *other* federal court', that is, other than itself. The Central Court . . . is a federal court. The jurisdiction is thus *completely established*.[73]

It became clear, however, that if the territorial courts were federal courts they were invalidly constituted, and in *Porter v. The King, ex parte Yee*,[74] Starke J. spoke of the 'incautious expressions' which had appeared in *Mainka's Case*. Isaacs backtracked from his dogmatically asserted statement in *Mainka*, but his explanations of what he had said in the earlier case were unconvincing, and were in effect a recantation without formal admission of error. Of course, a judge may go wrong and may very properly confess error; but Isaacs' dogmatism in asserting his propositions exposed him to peculiar embarrassment, for that very reason, when he took a contrary course in a subsequent case.

His wholehearted commitments sometimes led him into extravagant statement. In one of the cases in which he canvassed the scope of the immigration power of the Commonwealth, he spoke of the 'enormous public danger' which demanded national control over immigration.[75] His great victory in the court in the *Engineers'*

[72] see pp. 179ff. below.
[73] (1924) 34 C.L.R. 297, at p. 301. Italics supplied.
[74] (1926) 37 C.L.R. 432, at p. 450.
[75] *R. v. Macfarlane* (1923) 32 C.L.R. 518, at p. 564.

Case was registered in a judgment which, in Sir Owen Dixon's phrase, was 'expressed with a certain emphasis and perhaps copiousness of epithet which no doubt were to be accounted for by the conscious change in fundamental doctrine'.[76] There are many illustrations in the reports of this rhetorical, extravagant style. In *Duncan v. Queensland*[77] the question was whether a Queensland Act contravened section 92 of the constitution, and Isaacs and Barton, both dissenting, held that it did. It was an important case, but Isaacs' opening words put it out of all proportion.

> This is one of the most important cases, if indeed it be not the most important of all the cases, that have ever occupied the attention of this court. It concerns what I regard as one of the fundamental pacts of the constitution under which we live, the absolute right of freedom of trade and intercourse between the States. The result of any decision as to that right is so momentous as to impose upon any judge having to determine it as a permanent feature of the organic law of Australia an enormous weight of responsibility.

Interpretations of the scope of the arbitration power called forth some of his higher flights of rhetoric. In the *Insurance Staffs and Bank Officials' Case*[78] he was in the majority, holding that disputes as to wages and conditions involving insurance and banking staffs were industrial disputes within the meaning of section 51 (xxxv) of the constitution. Isaacs warned:

> if we were to attempt to confine the provision within the rigid bounds suggested, we should become, not the guardians, but the gaolers, of the constitution and particularly of the specific provision that directly or indirectly connects itself with almost all branches of our national life and progress. When we look back along the line of development that marks the course of industry it becomes evident that one practical indication of error in the contention is that the attempt would be patently useless. It must be seen that to attempt to stem the Atlantic tide of industrial disputes by some rigid legal definition would be so hopeless a task that no such futility can fairly be imputed to the people of Australia when they adopted the comprehensive terms we find in (the) constitution. And yet, if we were to adopt the invitation of the respondents and declare, in accordance with the first contention, that the paragraph in question is confined to undertakings carried on wholly or

[76] *Ex parte Professional Engineers' Association* (1959) 107 C.L.R. 208, at p. 239.
[77] (1916) 22 C.L.R. 556, at p. 605.
[78] (1923) 33 C.L.R. 517, at p. 525.

> mainly by means of manual labour, we should, in our opinion, go very far on the road, not merely of futility, but of destruction.

Such flights were not uncommon. His rhetoric carried him over the edge into absurdity as in *Matthews v. Foggit Jones Ltd*[79] where he insisted that a sausage in its skin remained meat 'just as much as the identity of a man remains whether he is called a soldier in uniform, a barrister in robes, or a cricketer in flannels', and in *Bruce v. Tyley*[80] where he dealt with the question of the assignability of a contract to collect garbage from a military camp in time of war. 'The removal of garbage *per se* is of course not a matter involving personal confidence. But the subject matter of the main contract is not garbage *per se*.' There was, he said, a matter of personal confidence involved. 'The contrary view maintains that it is immaterial whom he empowered to enter the camp as substitute for himself, whether a German, a licensed victualler or a woman.'

It is not hard to see how and why he irritated his colleagues on the Bench. For years it was the practice of the court for the judges to read their judgments in open court, and the High Court records state precisely the times at which readings were begun and concluded. It must have been a formidable experience to sit through the long Isaacs readings, delivered no doubt with a wealth of emphasis which matched the rhetoric of the written text. It seems that the practice of oral delivery was discontinued some time in 1920, and thereafter decisions were announced and the reasons were published but not read. Isaacs' judgments sometimes also reveal a slipperiness in moving to and from positions; a reading of his judgments on occasion leaves one with a sense that a result has sometimes been achieved by a trick, by sleight of hand. Isaacs never ceased to be a committed advocate, and the achievement of the desired result justified too much. Sometimes what appeared to be an agreement with his colleagues was really not that; as Barton wrote to Griffith in 1913: 'Isaacs uses his opinion which ostensibly agrees with mine to put his own interpretation on questions so as to give the same answer.' It is for this reason, almost certainly, that Isaacs was disliked so strongly; it has been said to me on many occasions that he could not be trusted. And something of this comes through in the pages of the law reports.

With all this, there can be no doubt, as Sir Owen Dixon put it,

[79] (1925) 37 C.L.R. 455, at p. 459.
[80] (1916) 31 C.L.R. 277, at pp. 291-2.

that Isaacs was a judge of great talent. As I have already said, he brought to his judicial work great technical and professional skills, wide learning and immense energy and commitment. This was reinforced by a strongly developed philosophy; in the constitutional field a commitment to the advancement of national power; in other fields a strong awareness of the social purposes of law. Sir Owen Dixon spoke of Griffith's mind and outlook as belonging to the Austinian age, whereas Isaacs in the classifications of jurisprudence would certainly have belonged to the sociological school. There is constant emphasis on the relevance of law and legal rules to contemporary social demands and requirements, and a concern, where desired change could not be achieved through the courts, that the legislature should be moved to take action. His sympathy for the problems of government and administration reflected an appreciation of the growing importance of the welfare state which was not generally shared by his contemporaries on the Bench, though I have suggested that, in some cases anyway, he was wanting in concern for the interests of individuals in dispute with government.

During his time on the Bench, there were some notable family and personal events. In 1910, Isaacs' elder daughter Marjorie married David Cohen of Sydney. The marriage took place in Melbourne. They had one son, Tom, who was Isaacs' only grandchild, for his other daughter, Nancy, who married Sefton Cullen in London, had no children. Isaacs maintained constant touch with his daughters by letter, and he had a great affection for his grandson. The letters to Marjorie make many affectionate references to him, and as the boy grew up, he was a welcome visitor in his grandfather's house. There is a fine photograph taken in 1915 of a somewhat dandified grandfather with a very young grandson with a long coachman's whip. Isaacs had a genuine interest in children, and a warmth and friendliness in his relations with them. For some time during the 1920s, the main family home was in a comfortable flat in Hampton Court, Sydney, though Marnanie at Macedon remained the regular holiday house. Isaacs found recreation in this comfortable house, entertaining guests, walking long distances, taking pleasure in the existence, though not in the cultivation, of its fine garden.

Not long after the end of the war, in 1921, Isaacs took leave from the court and went abroad. There is a photograph of him in a dark suit and grey Homburg hat astride a very long-eared donkey, held by a very grimy fellah, which was taken on a visit

to the Kings' Tombs at Luxor in Egypt in February 1921. While he was in England, he was sworn of the Privy Council, and among his papers is a letter from the Clerk to the Council directing him to be in attendance for the ceremony on 21 November, suitably attired in plain morning dress with frock coat. On this visit to England he met many men in public life, including Winston Churchill, then Colonial Secretary, to whom he wrote about Australian representation on the Judicial Committee of the Privy Council. Among the fragments of correspondence of that time is a letter from Lord Shaw of Dunfermline, a Scots lawyer and a Law Lord, and one from the Duke of Atholl. One may wonder if a momentary remembrance of his own beginnings crossed Isaacs' mind as he read the Duke's letter.

Blair Castle,
Blair Atholl
20th September, 1921.

Dear Mr Isaacs,

I was very sorry indeed that we were not here to welcome you at Blair, but it just happened to be the only week that we have been away this season. I am glad, however, that my brother was here, for he knows the ropes well, and I am sure was an interesting guide.

While I have no personal acquisitiveness in the matter, I do feel it rather sad to see these big properties passing, while in another generation there will be none of them left in the hands of the original holders. We have been here for 800 years, but we cannot stand another set of death duties. I do not think our going will help the people in any way, but it will break up a long historic connection of joint work between us and the people. It cannot be more cultivated than it is, and the new owner, whoever he may be—probably a Bradford copper merchant—will only come here in the champagne and turtle season, and will not live with the people, and among them. I only look upon myself as a life trustee for a great national possession. Breaking up the house and its collection cannot by any sound argument enrich the nation!

Yours sincerely,
Atholl

Isaacs maintained his English contacts by letter and even by cable, when the occasion warranted. He was in fact quite a frequent user of the telegraph services. In 1922 the Colonial Office acknowledged a cable to Winston Churchill, who had suffered an accident, which prompted Isaacs' message; and a little later Leo Amery,

then First Lord of the Admiralty, replied to a cable of congratulations from Isaacs on his appointment to the Privy Council. These letters of acknowledgment are preserved; doubtless there were many more, for Isaacs was an indefatigable correspondent.

In 1928 Isaacs was knighted as K.C.M.G. On 31 March 1930 Knox's resignation was accepted and on 2 April Isaacs' appointment as Chief Justice was announced. The story is told that one of his colleagues on the Bench pointed out to him that 1 April might not be an auspicious starting day. Duffy as senior puisne judge administered the oath and welcomed Isaacs on behalf of the Bench in Sydney. The Commonwealth Attorney-General, Frank Brennan, spoke on this occasion on behalf of the Commonwealth Government:

> I understand, sir, that your first essay in the public service of the nation was in the capacity of a teacher, and you have continued to be a teacher in the best sense of the word. You were not long in the public service before you realised that greater responsibilities and a wider destiny were in store for you. Having gone to the Bar you enriched it; you so distinguished yourself in Victoria that it was not long before you occupied one of the highest offices in the State. You will go down in history as one of those who greatly promoted the idea of union in the Commonwealth. Among distinguished brethren on the Bench you have been among the most distinguished.

Isaacs replied to the speeches of welcome:

> I have listened with deep emotion to what you have been good enough to say to me. These demonstrations are in accord with the terms of the communications that I have received within the last few days from governments and parties, judges, the bar, solicitors, law societies and citizens in other walks of life. I feel satisfied in my own mind that I take this chair with the concurrence of the people of Australia. I know full well that there are many faults and shortcomings that may be attributable to me. 'Who thinks a perfect judge to see thinks what ne'er was, nor is, nor e'er shall be.' From your hearts you express your confidence in me in my new and responsible position. I am a very happy man, a very fortunate judge, and I thank you.

Already, early in April, the press was canvassing the appointment of Isaacs as Governor-General, and while he maintained complete official silence on the matter, he collected and preserved the press reports. His tenure of office as Chief Justice was very short, and

the time and the psychologically unsettling circumstances gave him little opportunity to make any significant mark as an administrator of the court. In addition, he was ill for some time during this short period, although he was reported as having fully recovered by early August. On 21 January 1931 his resignation of the office of Chief Justice was formally accepted.

7

Interpreting the Constitution

THE LATE ROSS ANDERSON wrote aptly of 'the flame of an aggressive nationalism'[1] which burns through the constitutional judgments of Isaacs, and the theme of an expanding national power runs very strongly through many of his notable judgments in this field. Characteristically he stated and restated from the Bench on many occasions his general principles of constitutional interpretation. In 1920, not long after his epoch-making judgment in the *Engineers' Case*,[2] which was itself an elaborate essay on this theme, he stated that:

> It is unquestionably our duty, where occasion strictly calls for it, to declare regardless of consequences the pre-eminence of the constitution over any attempted legislation unauthorized. But it is equally the duty of the court where its judicial action is invoked to respect and, if necessary, to enforce the directions of parliament as the sole interpreter of the national will unless such directions are upon due occasion and argument solemnly adjudged to be invalid. And further it is the duty of this court, whatever be the validity or invalidity of any parliamentary enactment, *not* to interfere unless the constitution, either directly or through the authority of parliament, confers, in the particular instance, the power and the duty upon the court to interfere. Otherwise the interference of the court, whether the matter in question be valid or invalid, is an unwarrantable intrusion and a breach of the law as great as any it assumes to correct.[3]

That was said in the context of an application to the court to exercise supervisory control over certain industrial tribunals. Isaacs' point, in the particular case, was that the federal parliament had

[1] 'The States and Commonwealth Relations' in Essays on the Australian Constitution, ed. Else-Mitchell (Law Book Company, 2nd ed. 1961) at p. 97.

[2] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

[3] *King v. Hibble, ex parte Broken Hill Proprietary Co. Ltd* (1920) 28 C.L.R. 456, at p. 469.

expressed a legislative policy to give such tribunals effective and final control over industrial disputes, and that the court should not strain to discover constitutional reason to impede or nullify that policy. He also insisted that in interpreting the constitution it was necessary to take account of changing circumstances, and in particular that the court should acknowledge the needs of the nation. This was said many times: in support, for example, of broad interpretations of the federal industrial arbitration power where he put it that 'It is of the essence of a constitution that it is intended by its generality to adapt itself to the growth of the nation'[4] and in arguing broadly for the supremacy of federal industrial awards over State laws and awards in that field, he stated the issue as being:

> the power of the Australian nation as one component organism to regulate or define by means of conciliation and arbitration, where interstate disputes occur, the working conditions of its industries on a broad national basis . . . whether the Commonwealth as a whole is empowered to deal with its most momentous social problems on its own broad scale unimpeded by the sectional policies of particular States, or whether its legal adjustments of the reciprocal claims and moral rights of organized labour on the one hand, and organized capital on the other, so as to ensure their peaceful collaboration in the interests and on the uniform basis of the larger Australian citizenship and the larger Australian community, are to be in the first place prevented or afterwards antagonized, and in effect undone by additions, qualifications, or negations dictated by the more limited objects of a State and that in actual working vitally alter, or neutralize or even destroy them.[5]

This is a classic example of Isaacs' technique: to put up a straw man and then with massive rhetoric to knock him down and trample over him.

These examples are drawn from cases touching Commonwealth industrial legislation and power, and he produced similar arguments and principles to support other cherished constitutional doctrines. So in support of his view that section 92 (the clause which declares that trade, commerce and intercourse among the States shall be absolutely free) must be interpreted to strike at *State* sectionalism and barriers to the free flow of interstate trade, commerce and intercourse, he called for the recognition of the need to interpret

[4] *Burwood Cinema Ltd v. Australian Theatrical and Amusement Employees Association* (1925) 35 C.L.R. 528, at p. 539.

[5] *Clyde Engineering Co. Ltd v. Cowburn* (1926) 37 C.L.R. 466, at p. 479.

the constitution 'as a living instrument capable of fulfilling its high purpose of accompanying and aiding the national growth and progress of the people for whom it has been made'.[6] Cases involving the defence power of the Commonwealth during the first world war afforded an opportunity to expound doctrines asserting far reaching and indeed virtually limitless national power at such times.

When Isaacs spoke as he did in *Hibble's Case* of the court's duty to show restraint in face of parliamentary action and to show great respect for parliament as the authority principally charged under the constitution with the responsibility for interpreting the national will, he was, of course, speaking of the *national* parliament, and not of the parliaments of the States. He certainly shared the view of a great American judge, even if he did not precisely articulate it, that it would not have been disastrous had the power of judicial review been denied in respect of *national* legislative and governmental action, but that it would have struck at the vitals of the nation had that power been denied in respect of *State* legislation and governmental action. Such a view certainly comes through in his readings of section 92 of the constitution, and it is apparent also in other areas of constitutional interpretation. With Isaacs, the argument that the court should hold its hand, and act with great reticence in face of parliament's expressed views of its own constitutional power, was in no wise a repudiation of judicial activism. Some distinguished American judges have insistently expounded the doctrine that constitutional courts should use their power sparingly to strike down the Acts of legislatures and governments at both national and state levels, and while Isaacs' statement in *Hibble's Case* at first blush looks like an Australian affirmation of this approach to constitutional adjudication, it was in reality nothing of the kind.

In 1939, after he had retired into private life, he wrote in a pamphlet advocating constitutional reform that judicial review in a constitutional context was, at times anyway, of very questionable value: that too much was left to the idiosyncratic inferences of a few judicial minds, to borrow an oft-quoted phrase from a different context. Isaacs was there dealing with arguments directed to the desirability of writing into the Australian constitution 'bill of rights' provisions like those in the American constitution. These

[6] *Commonwealth & C.O.R. Ltd v. South Australia* (1926) 38 C.L.R. 408.

would have limited the exercise of legislative and governmental powers which abridged or were said to abridge fundamental freedoms, and would have imported notions like 'due process' as constitutional limitations. Isaacs, on this occasion, argued vigorously against such a course; he pointed to the sharp division in the Supreme Court of the United States in such cases, and he urged that it was the path of wisdom to leave such matters to the judgment of the electorate, rather than to judges. Not surprisingly, he referred to the interpretations of the Australian section 92 by the High Court and Privy Council after his retirement from the Bench, (which had in significant respects departed from his own interpretation of that section and of which he therefore disapproved), as an illustration of what happened when a constitution conferred ill-confined and sweepingly-expressed powers of judicial review. Notwithstanding such arguments against the assignment of overbroad powers of judicial review, Isaacs, throughout his career as a judge, was an activist, and the insistent, rhetorical and relentless advocate of an expanding national power.

We have seen that in his public speeches in support of federation in the early nineties, Isaacs had spoken of the growth of the nation, and of the need, in fashioning a constitution for the new Commonwealth, to take account of this. In the convention of 1897-8 he appeared pre-eminently as a Victorian, resistant to the arguments and demands of the smaller States, and he reinforced his big State arguments by reference to the need for a national rather than a parochial vision. However, in the Commonwealth parliament Isaacs had expressed sympathy for the distinctive position of the States in the federal polity when, in the debate on the Conciliation and Arbitration Bill on the issue of the subjection of State industrial employees and instrumentalities to the jurisdiction of the Arbitration Court, he argued that whatever the constitution might allow, there were cogent arguments of principle against such an extension.[7] Then, as Attorney-General in the second Deakin administration, he was the promoter and supporter of Commonwealth legislation which asserted extensive central power in controversial areas. The new protection tied regulation of industrial conditions to an exercise of taxing authority.[8] The union label was supported as an exercise of Commonwealth power over trade marks,[9] and the comprehensive

[7] see p. 89 above.

[8] see p. 103 above.

[9] see p. 101 above.

control of corporate activities by the Australian Industries Preservation Act was rested upon a very broad interpretation of the obscurely expressed Commonwealth legislative power over corporations.[10] Isaacs confidently supported these provisions as constitutionally valid, and he did so later on the Bench, though in each case as a dissenting judge.

The Commonwealth constitution assigns specific powers to the new federal authority it created; the powers conferred on the Commonwealth parliament are in some cases exclusive, and in other cases concurrent. An exclusive power, as its description suggests, is one wholly withdrawn from and denied to the States, while a concurrent power allows of exercise by both Commonwealth and States, and the constitution provides in case of inconsistent exercise of such powers that the Commonwealth legislation shall prevail. In its earliest days, the High Court was called upon to decide very general questions bearing upon the character of this constitutional scheme; questions indeed which had not been discussed, let alone resolved, in the federal conventions. Before Isaacs came to the court in October 1906, Griffith, Barton and O'Connor had pronounced upon the power of the Commonwealth and the States to interfere with and to affect each other's activities and instrumentalities (that is to say, government agents and agencies). In the context of State interference with Commonwealth instrumentalities, the question first arose in respect of the operation of a Tasmanian Act requiring persons to pay State stamp duty on receipts for salaries, and the specific question for the court was whether this Act could apply to a Commonwealth employee.[11] The same issue arose in determining the liability of the salaries of Commonwealth officers to State income tax.[12] In these cases, the court unanimously ruled that the State laws could not impose such obligations on Commonwealth instrumentalities; with the support of American authority, it was said that if a State should attempt to give to its legislative or executive authority an operation which, if valid, would fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the constitution, was to that extent invalid and inoperative. And, conversely, in the *State*

[10] see p. 104 above.

[11] *D'Emden v. Pedder* (1904) 1 C.L.R. 91.

[12] *Deakin v. Webb, Lyne v. Webb* (1904) 1 C.L.R. 585.

Railway Servants' Case[13] the same court applied the same principle, again with the support of American authority, to Commonwealth action affecting State instrumentalities. In that case, the much debated provision of the Conciliation and Arbitration Act giving jurisdiction over State industrial employees was held invalid.

So was born the first major constitutional doctrine, the reciprocal immunity of instrumentalities. The second was the doctrine of implied prohibitions or reserved State powers. It was first stated in *Peterswald v. Bartley*,[14] and it asserted that in general Commonwealth power should be narrowly construed; that the scheme of the constitution, in leaving the general *residue* of powers with the States, implied that that residue was very large, that it embraced the 'private or internal affairs of the States', and that:

> The constitution contains no provision for enabling the Commonwealth parliament to interfere with the private or internal affairs of the States, or to restrict the power of the States to regulate the carrying on of any business or trades within their boundaries, or even, if they think fit, to prohibit them altogether.[15]

In accordance with this principle, it was held in that case that a New South Wales tax on brewers was not a duty of excise, a class of tax exclusively reserved to the Commonwealth by the constitution.

Shortly after Isaacs became a member of the court, the Privy Council in *Webb v. Outrim*[16] on appeal *direct* from the Supreme Court of Victoria rejected the doctrine of the immunity of instrumentalities in the specific context of State taxation of federal salaries. It was the first major decision on the constitution by the Privy Council, and it was, generally speaking, a poor piece of judicial craftsmanship. When the precise question subsequently arose in the High Court in *Baxter v. Commissioners of Taxation (N.S.W.)*[17] that court was called upon to decide whether it should adhere to its own earlier decisions, or follow the Privy Council decision. For technical reasons bearing on the character of the constitutional question involved, the court held that it was not bound to follow the Privy Council and might, if it so desired, reaffirm the doctrine stated by it in earlier cases. The majority, composed of the three senior justices, did so. Isaacs agreed with the majority in two major respects: he agreed that in the particular case there

[13] (1906) 3 C.L.R. 807.
[14] (1904) 1 C.L.R. 497.
[15] at p. 507.
[16] [1907] A.C. 81.
[17] (1907) 4 C.L.R. 1087.

was no obligation to follow the Privy Council and he accepted the general formulation of the doctrine of the immunity of instrumentalities. He differed however from the majority in holding that a non-discriminatory State income tax was not a prohibited interference with federal instrumentalities.

Very early in his judicial career he differed sharply from the senior judges in three cases in which they invoked the doctrine of implied prohibitions or reserved State powers. These concerned legislation with which he was much involved as Attorney-General, but that involvement in no wise restrained him from adjudicating on their validity as a judge, and perhaps added a special vehemence to the statement of his views. In *R. v. Barger*[18] the 'new protection' legislation was invalidated, and there the issue was whether Commonwealth legislation imposing an excise on agricultural machinery, and exempting machinery manufactured under fair and reasonable conditions of labour, was valid. The majority, comprising the three senior justices, held it invalid; their main point was that on a proper characterization this was not a tax law, but a law with respect to conditions of work and labour, an area reserved to the States. Isaacs and Higgins dissented. Isaacs argued forcefully that the Commonwealth indisputably had a power to tax, and that this particular legislation answered the description of a tax, and that this characterization of it was not affected by the exempting clauses. In the *Union Label Case*[19] the issue was the validity of the union label, the mark designating goods as having been made by union labour.[20] Once again the majority held that this was not properly characterized as a law with respect to trade marks, as the union label did not answer the description of such a mark as understood when the constitution came into operation in 1901. Isaacs and Higgins again dissented, and with copious citation of authority and learning, Isaacs argued that such a mark was properly described as a trade mark. In the third case, *Huddart Parker v. Moorehead*,[21] which involved the validity of the Commonwealth parliament's attempt in the Australian Industries Preservation Act to control the activities of corporations without regard to the inter-stateness or intra-stateness of their activities, Isaacs stood alone in the court in asserting that the federal power with respect to corporations supported this exercise of power. Isaacs protested at

[18] (1908) 6 C.L.R. 4.

[19] *A.G. (N.S.W.) v. Brewery Employees Union of N.S.W.* (1908) 6 C.L.R. 469.

[20] see p. 101 above.

[21] (1909) 8 C.L.R. 330.

the action of the court in 'hunting for reasons' to cut down the plain words of the constitution and to frustrate the intention of the founders. Higgins did not support him on this occasion, but held that on its proper characterization this was not a law with respect to corporations but one with respect to monopolization, and over this particular matter the constitution assigned no power to the Commonwealth.

In all three cases, the three senior justices, who formed a consistent majority, relied heavily on the doctrine of implied prohibitions or reserved State powers. As Griffith put it in *Huddart Parker v. Moorehead*, the words of the Commonwealth power over corporations

> are not clear and unequivocal, but are open to two constructions, and . . . I think that they ought not to be construed as authorizing the Commonwealth to invade the field of State law as to domestic trade, the carrying on of which is within the capacity of trading and financial corporations formed under the laws of the State.[22]

On this particular point, Isaacs argued convincingly in all these cases that it was not possible to determine the content of a *specific* federal power by reference to the undefined and general residuary power of the States. As he put it in *Barger's Case*:

> It is contrary to reason to shorten the expressly granted powers by the undefined residuum. As well might the precedent gift in a will be limited by first assuming the extent of the ultimate residuum.[23]

The conflict between the two wings of the court on this basic principle of interpretation was waged over many years; in the hands of the senior justices the doctrine of implied prohibitions served as a formidable brake on federal legislative power. In the *Royal Commissions Case*[24] in 1912, the majority struck down provisions of the Commonwealth Royal Commissions Act as *ultra vires*. Isaacs there argued that under section 128 of the constitution, the possibility of amendment of the constitution was contemplated, and that the Act was an exercise of the incidental power conferred on the Commonwealth parliament by section 51 (xxxix) of the constitution to inform itself on matters which might be appropriate for constitutional change, which, under the constitution, section 128,

[22] at p. 354.
[23] (1908) 6 C.L.R. 41, at p. 84.
[24] (1912) 15 C.L.R. 182.

required parliamentary initiative. It was a characteristic exercise in ingenuity, and far-fetched, but supported by him in the usual way. He was 'without personal doubt'.[25] To Griffith this argument was so contrived, so monstrous in its impact on the federal balance, that it merited no consideration.[26] Sometimes, and particularly when the composition of the court changed in 1913, Isaacs' view prevailed over those of the two surviving senior justices. So in *Australian Steamships Ltd v. Malcolm*[27] the majority, including Isaacs, held, over the dissent of Griffith and Barton, that the constitution authorized Commonwealth legislation which in effect extended the principles of Workers' Compensation legislation to seamen in the coastal trade. Isaacs once again stressed that it was simply impossible to reach a decision by reference to the reserved powers of the States; the only question was whether the legislation was sustainable as an exercise of specific Commonwealth powers, and of this he had no doubt.

Finally in the *Engineers' Case*[28] Isaacs, once again speaking for a majority, renewed the attack. Griffith had retired, and Barton was dead. The determination of the issues raised in the *Engineers' Case* did not call for an extended discussion of the doctrine of implied prohibitions, but Isaacs in this historic judgment chose to restate the central principles of constitutional interpretation. It was, he said:

> fundamental and fatal error to read sec. 107[29] as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed unless that reservation is as explicitly stated. . . . The doctrine of 'implied prohibition' finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning.[30]

On this particular issue the views insistently put by Isaacs have prevailed. As Sir Owen Dixon put it in a later case, which in other respects stated doctrines which surely would not have commanded Isaacs' support:

[25] at p. 213.
[26] at pp. 194, 195. See p. 119 above.
[27] (1914) 19 C.L.R. 298.
[28] (1920) 28 C.L.R. 129.
[29] Section 107 provides that 'Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.'
[30] at pp. 154-5.

> The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation . . . the attempt to read sec. 107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic.[31]

Isaacs' lasting victory on this front did not dispose of all the issues in the particular cases in which he repeatedly challenged the doctrine of reserved State powers. Notwithstanding the discrediting of the general doctrine, it has long been a question whether *Barger's Case* would now be differently decided. For the specific powers granted to the Commonwealth necessarily raise questions of characterization: the question is whether the law challenged in *Barger* was properly described as one with respect to taxation (within Commonwealth power) or with respect to conditions of employment (within State power). It is easy to see how by attaching such conditions to the imposition of a tax, the Commonwealth could effectively exercise control over many matters on which it could not directly legislate. In the Australian constitution the problems of characterization of particular laws as falling within or outside particular Commonwealth powers are often difficult. Recently the High Court has indicated a preference for Isaacs' view in *Barger*, and has said that the decision in that case was heavily influenced by the now discredited doctrine of reserved State powers.[32] In the *Royal Commissions Case*, and *a fortiori* in *Huddart Parker v. Moorehead*, it is at best doubtful whether the actual decision would be different at the present day. Once again the real problem is the characterization of a particular law as falling within or beyond a specific Commonwealth head of power. In his approach to such problems, Isaacs was profoundly influenced by his sympathy for the national power; other judges have not necessarily viewed the matter in this light.

The other major principle of constitutional interpretation, as we have seen, was the doctrine of the immunity of instrumentalities. By the time Isaacs came to the court it had been stated as a *reciprocal* doctrine, applying alike to federal and State action. In *Baxter's Case*, Isaacs had disagreed only on particular interpretations, and had accepted the general principle at least in the context of the application of State law to a federal instrumentality. Not long after-

[31] *City of Melbourne v. Commonwealth* (the *State Banking Case*) (1947) 74 C.L.R. 31, at p. 83.

[32] *Fairfax v. Commissioner of Taxation* (1966) 39 A.L.J.R. 308.

wards the question arose whether goods imported by the State of New South Wales were subject to Commonwealth customs laws. In these cases, the court unanimously held that they were subject to such laws notwithstanding the general doctrine. The judges who were the authors of the doctrine of the immunity of instrumentalities held that in this particular context, the States were necessarily subject to Commonwealth law, for the scheme of the constitution was to vest exclusive customs control in the Commonwealth and thereby to give it sole power to determine tariff policies. If imports by States were exempt, it was obvious to all the judges that a coach and four could be driven through a national tariff policy. Isaacs put it very definitely:

> I am therefore unable to agree with the contention that the constitution leaves the Commonwealth powerless as against the States to regulate foreign trade and commerce; or, phrasing it differently, that the King, as representing the Executive of the States, was not intended to be affected by the transference or creation of the powers enumerated in the constitution; and I entertain no doubt that the federal parliament is authorized by appropriate legislation to prohibit the importation of goods by the State government.[33]

Isaacs was later, in the *Engineers' Case*, to refer to these customs cases as illustrating what he described as the 'utmost confusion and uncertainty . . . as the decisions now stand',[34] and he said that these decisions were 'hopelessly opposed'[35] to other decisions in which the court had asserted the doctrine of the immunity of instrumentalities. Then in *Chaplin v. Commissioner of Taxes (S.A.)*[36] the court (consisting of Griffith, Barton and O'Connor) held that a Commonwealth statute, the Commonwealth Salaries Act 1907, which had *expressly* subjected the salaries of federal officers to non-discriminatory State taxes, was constitutional. It was certainly arguable, and it was argued, that if the doctrine of immunity of instrumentalities (which these judges had fathered) was an implication drawn from the constitution itself, no mere Commonwealth statute could affect its operation. But the judges brushed the argument aside.

The supporters of the doctrine were prepared to concede

[33] *R. v. Sutton* (1908) 5 C.L.R. 789, at p. 811. See also *A.G. N.S.W. v. Collector of Customs (N.S.W.)* (the *Steel Rails Case*) (1908) 5 C.L.R. 818.

[34] (1920) 28 C.L.R. 129, at p. 159.

[35] ibid, at p. 158.

[36] (1911) 12 C.L.R. 375.

qualifications to its operation. On the other hand, on the very eve of the *Engineers' Case*, Isaacs supported the majority in holding that where employees of the States of Victoria and New South Wales were involved in dispute over conditions of employment with their employees, the Arbitration Court had no jurisdiction to deal with the particular dispute. This, in Isaacs' view, was because the particular activities were governmental and not mere trading operations of the States.

> The whole scheme [he said] is dominated by the ultimate purpose, namely the defence of the Empire. It must steadily be borne in mind that the acts dealt with in this case are all assumed to be lawful acts, and strictly within the legal powers of the government concerned. And these legal acts were not aimed at the satisfaction of private needs, but for the one great public purpose. The character of trading being absent and the nature of the power being governmental,[37]

there was no jurisdiction over the State in such a case. This distinction between functions of government, separating those which are distinctively governmental or regal from those which are not of such a character, has been made in other areas of public law; it is now discredited, and rightly, and Isaacs' own distinction in this case has been squarely disapproved by the High Court of Australia.[38]

The great test came with the *Engineers' Case*[39] in 1920, in which Isaacs' views prevailed. Shortly before this case arose, Knox had replaced Griffith as Chief Justice, and Starke had taken Barton's seat. Knox and Starke were both in the majority in this case, and the majority judgment bore the clear imprint of Isaacs' style. The question for the court was whether a dispute between unions and Western Australian State authorities was subject to the federal arbitration power, and it is clear that the issue might have been disposed of by a narrow holding that these were merely trading functions of the State, and, as such, subject to federal regulation. But the court took higher ground and chose to re-examine the line of authority which had established the doctrine of the immunity of instrumentalities. In doing so, Isaacs seized a golden opportunity to

[37] *Australian Workers' Union v. Adelaide Milling Co. Ltd* (1919) 26 C.L.R. 460, at p. 470.

[38] *Ex parte Professional Engineers' Association* (1959) 107 C.L.R. 208. See p. 178 below.

[39] (1920) 28 C.L.R. 129.

restate the basic principles of constitutional interpretation. He called for an interpretation which took the court 'back to the constitution'. That instrument was a British statute, to be interpreted in accordance with settled rules of interpretation for such statutes, and there was no justification for importing implications or doctrines of necessity such as the immunity of instrumentalities.

> It is an interpretation of the constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the constitution, and which when stated, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the court on the opinions of judges as to hopes and expectations respecting vague external conditions. This method of interpretation cannot, we think, provide any secure foundations for Commonwealth or State action, and must inevitably lead—and in fact has already led—to divergences and inconsistencies more and more pronounced as the decisions accumulate.[40]

Isaacs was obviously in his element. American authorities, he said, were no safe guide to the interpretation of the British statute which was the Australian Constitution Act, and the Australian constitution was 'radically' distinguishable from its American counterpart which had been so copiously referred to in the convention of the nineties. The two main points of difference were, in the Australian context, the common sovereignty of all parts of the British Empire, and the principle of responsible government. As to this, the late Sir John Latham (who, forty years earlier, had been junior counsel in the *Engineers' Case* for the States of Victoria, South Australia and Tasmania, intervening) wrote in 1961 that:

> [it] is difficult to see precisely what effect these cardinal principles had upon the decision in the *Engineers' Case* or in any other case. The common sovereignty of the British Commonwealth lends itself to Athanasian distinctions. The Crown is single and indivisible; but it has many manifestations. Its manifestations are different governments. They may make agreements with one another—they may owe money to one another. They have different treasury pockets, but nevertheless, *sub specie aeternitatis*, they are all one. As to responsible

[40] (1920) 28 C.L.R., at p. 145.

> government, it is not easy to discover a case in which the construction of a statute has been affected by the fact that it was passed by a legislature which contained executive ministers as members and which had the power of bringing about a resignation or dismissal of such ministers.[41]

This comment, which so well reflects Latham's style and mind, has been repeated by others. Without going into too much technicality, it is fair to say that it is difficult to see the relevance of responsible government to the issue, if, that is, Isaacs meant by responsible government what Latham understood him to mean. Professor Sawer has said that:

> the references to responsible government support an argument that in the Australian system, as distinct from the American, the courts can and should leave relatively more of the problems of adjustment in a federal system to the decision of the electorate. It is a view with which one can disagree, but it is not rhetoric.[42]

If Isaacs meant this when he spoke of responsible government, his point was quite comprehensible, but he would have done better to phrase it differently.

Having dealt with the general principles of constitutional interpretation, and having also carried the majority with him in expressing disapproval of the doctrine of reserved State powers, which was not directly involved in the case, Isaacs proceeded to consider the authorities which, as we have seen, he vigorously demolished on the ground of 'hopeless' inconsistency. Cases like *D'Emden v. Pedder* he was prepared to sustain *not* upon the general doctrine of immunity of instrumentalities, but upon the basis of an inconsistency between the Commonwealth and the State laws in that case. Inconsistency is specifically dealt with by section 109 of the constitution which provides that to the extent to which a Commonwealth law is inconsistent with a law of the State, the former shall prevail and the latter be invalid. As to this contentious reading of *D'Emden v. Pedder*, Sir John Latham has said that that decision was not 'in any respect in fact based upon s. 109 of the constitution',[43] and that is plainly right. Isaacs rewrote the

[41] 'Interpreting the Constitution' in Essays on the Australian Constitution, ed. Else-Mitchell (2nd ed. 1961) at pp. 28-9.

[42] Sawer: 'State Statutes and the Commonwealth' (1962) 1 Tasmania L.R. 580, at p. 585.

[43] 'Interpreting the Constitution', op. cit., at p. 32.

earlier decision in order to furnish a basis on which it could be supported. But the *Railway Servants' Case*, which held that the State railways and their employees were not subject to the jurisdiction of the Arbitration Court, could not be reinterpreted in this way, for there the only basis for exemption from the operation of the Commonwealth statute was the general doctrine of immunity of instrumentalities. The *Railway Servants' Case* was the lion in the path of Isaacs' conclusion; he simply destroyed the lion by holding the decision to be 'wholly irreconcilable' with other decisions of the court, 'unsound' and wrong.[44]

For all the breadth of constitutional principle in the *Engineers' Case*, there was some caution and restraint in the statement of applications; it was said that State instrumentalities were subject to the arbitration power and that it was unnecessary to go further.[45] But even allowing for the qualification—which may have been inserted to take account of the need to gain the support of the majority who concurred in the judgment, and may have meant little to Isaacs himself—the sweep of the principle was broad. The first major application of the doctrine was the *Harbour Trust Case*[46] in which the claimants included marine pilots and tug crews and the respondents were ministers of the Crown including the Colonial Treasurer and Minister of Public Works for New South Wales. The case was argued immediately after the *Engineers' Case* and judgment was delivered on the same day as in that case. The *Engineers' Case* was followed; as a commentator fiercely hostile to the decision put it:

> by the inroads which [the *Engineers' Case*] makes into the fundamental doctrine of the federation, the preservation of State rights, there is involved in it [the *Harbour Trust Case*] an affront to the national dignity of the States far exceeding that involved in the *Engineers' Case*. In the *Engineers' Case* the minister concerned held a newly-created office, and his portfolio, as the name, 'Minister for Trading Concerns' indicates, was associated only with industrial matters. In this present case the ministers affected were the holders of portfolios with historic associations stretching over the whole

[44] (1920) 28 C.L.R., at p. 159.

[45] 'If, in any further case concerning the prerogative in the broader sense, or arising under some other Commonwealth power—for instance, taxation—the extent of that power should come under consideration . . . the special nature of the power may have to be taken into account.' ibid, at p. 143.

[46] *Merchant Service Guild of Australia v. Commonwealth Steam Ship Owners' Association* (1920) 28 C.L.R. 436.

political history of New South Wales. The case is . . . an illustration of the extent to which a professedly democratic people appear, according to it, to have surrendered their rights of self-government.[47]

The author, Dr T. C. Brennan, devoted his book *Interpreting the Constitution* to an extended attack upon the doctrine of the *Engineers' Case*, and the polemic of this passage reveals a great depth of feeling against a doctrine which he regarded as subversive of the spirit of the constitution and as destructive of the proper position of the States within the federal system.

In its specific holdings, the *Engineers' Case* has stood; in 1959 it was said in the High Court:

> We heard some muffled echoes of old arguments. But we cannot open our ears to them. Doctrines discarded by the decision in the *Engineers' Case* cannot be revived to defeat the claims of these latter-day engineers.[48]

The question, however, was the ambit of the case. In *Pirrie v. McFarlane*,[49] in 1925, Isaacs as a member of the court was confronted with the question whether a Commonwealth Air Force driver might be prosecuted for driving in Victoria without a Victorian licence as required by State law. No Commonwealth statute expressly exempted him from the obligation to possess such a licence, and the majority in the court, specifically applying the *Engineers' Case*, held that in the absence of express exempting Commonwealth legislation, the driver was subject to this State law. Isaacs flatly disagreed; the *Engineers' Case* in his view did not touch the matter, since the function of defence was *exclusively* vested by the constitution in the Commonwealth and control of the activities of the Commonwealth defence forces was:

> entirely outside the range of the State constitution . . . I hold without reservation that not even *prima facie* have they any obligation to observe State law in *the performance of their Commonwealth duties*.[50]

The language was the customary rhetoric; he declared it to be beyond belief that it could be 'seriously contended' that any other

[47] T. C. Brennan: Interpreting the Constitution (Melbourne University Press 1935) at p. 127.

[48] *Ex parte Professional Engineers' Association* (1959) 107 C.L.R. 208, at p. 276 *per* Windeyer J.

[49] (1925) 36 C.L.R. 170.

[50] at pp. 199, 204. Italics were Isaacs' own.

view was possible. He added other reinforcing arguments[51] but this one was central. Isaacs believed that defence was an *exclusive* Commonwealth power (a view which is only supportable as to particular aspects of the power), and because of this no State law could intrude into the Commonwealth domain. It is not clear that he would have been prepared to carry the matter beyond the field of exclusive powers, though there were some very general statements in his judgment. Almost forty years later,[52] the High Court, under the leadership of Sir Owen Dixon, was to state very broad doctrines which, while again not fully developed, cast some doubt on the majority holding in *Pirrie v. McFarlane*.

Although in the *Engineers' Case* Isaacs attacked the doctrine of the immunity of instrumentalities *generally*, he was principally concerned with restraints upon the advance of federal power. It has been pointed out that some rather cautious language was used in that case and it was open to the construction that the repudiation of doctrines of implication and necessity was to be read in the context of the particular issue before the court. In *West v. Commissioner of Taxation (N.S.W.)*,[53] when the question was raised whether a non-discriminatory State income tax might be levied on the pensions of federal officers granted to them by Commonwealth legislation—a question which had never been specifically answered—the High Court, less than a decade after Isaacs had left it, answered it affirmatively. But both Dixon and Evatt seized the occasion to point out that if a State tax *discriminated* against or imposed a *special burden* on federal pensions, the answer might be different, and Evatt was disposed to go even further in working out implications to be spelled out of the federal character of the constitution. As Sir Owen Dixon said:

> Since the *Engineers' Case*, a notion seems to have gained currency that in interpreting the constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied. I do not think that the judgment of the majority in the High Court in the *Engineers' Case* meant to propound such a doctrine. It is inconsistent with many of the reasons afterwards advanced by Isaacs J. himself for his dissent in *Pirrie v. McFarlane*.[54]

[51] An inconsistency between Commonwealth law as it stood and the State law.
[52] *Commonwealth v. Cigamatic Pty Ltd (In Liquidation)* (1962) 108 C.L.R. 372.
[53] (1937) 56 C.L.R. 657. [54] at p. 681.

In this case, the talk of implications was *dictum*; a decade later in the *State Banking Case*[55] it lay at the heart of the court's decision. The question there was whether the Commonwealth Banking Act 1945 in purporting to restrict the banking facilities of States by denying them the services of private banks was constitutional, and it was held that it was not. Sir Owen Dixon developed what he had said in *West's Case*: this was discriminatory legislation singling out the States by imposing a particular disability or burden upon them, and in support of such a use of power—here the Commonwealth banking power—the *Engineers' Case* had nothing to say. Such discriminating legislation was forbidden:

> notwithstanding the complete overthrow of the general doctrine of reciprocal immunity of government agencies and the discrediting of the reasoning used in its justification. For that reason the distinction has been constantly drawn between a law of general application and a provision singling out governments and placing special burdens upon the exercise of powers of the fulfilment of functions constitutionally belonging to them. It is but a consequence of the conception upon which the constitution is framed. The foundation of the constitution is the conception of a central government and a number of State governments separately organized. The constitution predicates their continued existence as independent entities.[56]

Some other members of the court were disposed to state doctrines of implication in more sweeping terms. One may guess with confidence that Isaacs would have repudiated these 'revived' doctrines of federal implications root and branch; they struck at federal power and that, in itself, was probably enough. The new version of implied immunity in the *State Banking Case* has been the subject of acute criticism by Professor Sawer who argues that it depends upon the importation of political notions of federalism for which there is no clear warrant upon the face of the constitution.[57] The revived doctrines have been kept within comparatively confined limits, but within these limits there is little doubt that they represent the present views of the court, and there is currently a strong emphasis on a dual federalism which, as a limitation on federal power, Isaacs would surely have found unacceptable. It is somewhat odd, as

[55] (1947) 74 C.L.R. 1.

[56] at pp. 81-2.

[57] 'Implications and the Constitution' (1948) 4 Res Judicatae 15, 85.

Sawer has pointed out,[58] that the *Engineers' Case* came at a time when the political climate did not favour the advance of national power which this judicial decision made possible; the newer, more restrictive doctrines have been enunciated at a time when ever greater emphasis is placed politically on Commonwealth power.

Isaacs' approach to the constitution may also be illustrated by his large interpretations of *specific* Commonwealth powers. Three of them may be taken by way of illustration: defence, immigration and industrial arbitration. On the need for a national defence power all were agreed: Sir Henry Parkes developed this theme in his famous speech at Tenterfield in 1889, when he called for a national conference to propose a plan of Australian federation. The power as framed by the convention reflected in its terms a conception of defence apt to the conditions of the time,[59] and no one then foresaw the demands which the great wars of the twentieth century would make on the manpower and resources of the nation. When war broke out in 1914, and the character of its demands became apparent, it was a question whether the defence power was capable of furnishing legislative support for what was in effect a large-scale mobilization of national resources. In *Farey v. Burvett*,[60] in 1916, the question for the court was whether the defence power would support regulations fixing the price of bread. It was argued that such controls made possible the effective allocation and the most equitable distribution of the wheat resources of the nation in the interests of the over-all allied war effort. The majority in the court answered the question affirmatively; but Isaacs went further in framing the widest ambit of national power. While Griffith was willing to allow that the power must not be confined by its narrow nineteenth century terminology, he required a showing of *substantial* connection between the enacted measure and the defence of the Commonwealth. Isaacs, his imagination fired by a conception of the nation in arms and by an ardent imperialism, insisted that constitutionality was established if

> the measure questioned may conceivably in such circumstances *even incidentally* aid the effectuation of the power of defence. [If it did]

[58] Australian Federal Politics and Law, Vol. 1, at p. 329.

[59] Section 51 (vi) provides that the Commonwealth parliament has power subject to this Constitution to make laws 'with respect to the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth'.

[60] (1916) 21 C.L.R. 433.

the court must hold its hand and leave the rest to the judgment and wisdom and discretion of the parliament and the Executive it controls.[61]

The argument was developed in the most sweeping terms. In time of war, he said, the defence power

> . . . is the *ultima ratio* of the nation. The defence power then has gone beyond the stage of preparation; and passing into action becomes the pivot of the constitution because it is the bulwark of the State. Its limits then are bounded only by the requirements of self preservation. . . . The constitution cannot be so construed as to contemplate its own destruction or, what amounts to the same thing, to cripple by checks and balances the ultimate power which is created for the undeniable purpose of preserving at all hazards and by all available means the inviolability of the Commonwealth and of the several States.[62]

To illustrate the proposition, he took the case of section 92, which, as he then thought, normally bound Commonwealth and States alike. But this, he insisted, was peacetime doctrine; it could not be asserted 'for a moment' that it limited the wartime Commonwealth power of defence. In other wartime cases he supported Acts which severely restricted individual liberty,[63] and he asserted generally the widest national power to deal with person and property. So it was held with his full support that the Commonwealth might make it an offence to encourage the destruction or injury of property during the war;[64] this, he said, was if anything clearer than *Farey v. Burvett* since all property was part of the national resources committed to the war effort. He held that the executive government had very wide discretionary power to prohibit transactions deemed to constitute trading with the enemy[65] and to deal with the property of enemy subjects.[66] In *Sickerdick v. Ashton*[67] the court rejected arguments that laws made under the defence power might not have extra-territorial operation to the extent necessary when Australian forces were involved abroad.

[61] at p. 455. Italics supplied.

[62] at pp. 453, 454.

[63] *Lloyd v. Wallach* (1915) 20 C.L.R. 299; *Pankhurst v. Kiernan* (1917) 24 C.L.R. 120.

[64] *Pankhurst v. Kiernan* (1917) 24 C.L.R. 120.

[65] *Welsbach Light Co. Ltd v. Commonwealth* (1916) 22 C.L.R. 268.

[66] *Burkard v. Oakley* (1918) 25 C.L.R. 422.

[67] (1918) 25 C.L.R. 506.

> The objection [said Isaacs] has no merit. It is absurd to limit the effectual defence of Australia or any country to operations on its own territory. Imagine the Navy confined to the three mile limit![68]

He also joined in upholding legislation authorizing the deportation of aliens, notwithstanding that this would make the alien liable to military conscription in his own country.

There were majorities, of which Isaacs was in each case a member, supporting challenged Commonwealth wartime legislation based on the defence power. Isaacs, however, went further than any of his brethren in his statement of the ambit of Commonwealth power. In *Snow's Case*,[69] which did not raise constitutional issues, but involved a prosecution for trading with the enemy, his passionate invective[70] directed against wartime profiteering drew a justified rebuke from Griffith that Isaacs had strayed from the judicial path. And what he said in *Farey v. Burvett* amounted to an assertion that in time of war, *salus populi suprema lex*. Tested by his own illustration of the non-applicability of section 92, that doctrine was squarely disapproved by the High Court in the second world war case of *Gratwick v. Johnson*,[71] where the legislation directly prohibited interstate travel. It is unlikely however that skilfully drafted measures which are genuinely connected with defence would run much risk from the operation of section 92.[72] It is also true that the second world war cases, and particularly those in which particular legislative provisions were held beyond power, support a view of the definition of the defence power closer to Griffith's requirement of substantial connection than to Isaacs' test of conceivable and even incidental relationship. In the wartime defence cases, Isaacs was the most ardent and extreme supporter of Commonwealth power.

The power of the Commonwealth to legislate with respect to 'immigration and emigration', section 51 (xxvii), was held by Isaacs to have a very broad reach. In the federal parliament, as we have seen,[73] he stressed the vital importance to the national welfare of stringent controls over migration. Very early in his judicial career, he asserted that the mere fact of birth in Australia did not deny power to refuse re-entry into Australia; on the facts

[68] at p. 517.

[69] (1915) 20 C.L.R. 315.

[70] see p. 119 above.

[71] (1945) 70 C.L.R. 1.

[72] See Derham: 'The Defence Power' in Essays on the Australian Constitution, ed. Else-Mitchell (2nd ed. 1961) at p. 187.

[73] see p. 82 above.

of that case he held, in dissent, that an Australian-born Chinese had severed himself from the Australian community by his sojourn abroad, so that he could be treated as an immigrant and within the scope of immigration control.[74] In the *Irish Envoys' Case*[75] Isaacs, as a member of the majority in the court, held that the immigration power amply authorized a provision in the Immigration Act providing for the deportation of immigrants. In that case, action was brought to restrain the proceedings of a board appointed under the Act to advise the minister whether two Irish envoys, who had come to Australia as visitors to win support for the cause of the Irish Republicans, should be deported. The cause for which they stood was anathema to Isaacs, a vigorous and a florid supporter of the imperial link, and it also afforded him an opportunity to expound on the character of Commonwealth power. He rightly rejected the argument that the immigration power did not permit control and regulation of visitors. Characteristically he dealt the contrary argument violent blows. 'Is our Constitution so grotesque as is represented?', and he pointed to the 'enormous public danger' which might flow from the entry of dangerous visitors.[76] The strength of his feeling was indicated by the great elaboration of the argument; he massed a seemingly unnecessary volume of history and legal authority and a great deal of rhetoric to support what seemed to be a reasonably clear point. His general formulation of the scope of the immigration power disclosed his view of its breadth.

> The history of this country and its development has been, and must inevitably be, largely the story of its policy with respect to population from abroad. That naturally involves the perfect control of the subject of immigration, both as to encouragement and restriction with all their incidents. This control, I hold, the Commonwealth parliament possesses in amplitude.[77]

That reading of the power was restated by him in dissent in a celebrated case of the 1920s, *Ex parte Walsh and Johnson*.[78] The federal government sought to deal with certain industrial problems by deporting union leaders under the authority of the Immigration Act. It was a question whether the power of deportation could

[74] *Potter v. Minahan* (1908) 7 C.L.R. 277.

[75] *R. v. Macfarlane, ex parte O'Flanagan & O'Kelly* (1923) 32 C.L.R. 518.

[76] at pp. 557, 564. [77] at p. 557.

[78] (1925) 37 C.L.R. 36.

reach Johnson who, though born in Holland, had entered Australia in 1910, and was naturalized in 1913. From 1910 to 1925, when the case arose, he had never left Australia. The majority in the court held that he had become a member of the Australian community and had passed beyond the reach of the immigration power. Isaacs, in a long judgment, dissented vehemently. In essence his argument was that so long as a person had entered Australia as an immigrant *since* federation, the arm of the immigration power continued to reach out to him. He asserted the principle 'once an immigrant, always an immigrant' with the consequence that such a person could not 'dig himself into this Commonwealth, so as to be irrevocably, so far as the Commonwealth power is concerned, a member of the people of the Commonwealth . . . and thereby escape the immigration power for ever'. If the immigration power ceased to operate once a person had entered Australia, 'the cherished national policy of Australia would indeed be in peril'.[79] Of course, no one argued for so drastic a restriction upon the Commonwealth power; the point made by the majority was that there came a point in time—which Johnson had long since passed—at which he could no longer be said to be an immigrant.

Since Isaacs ceased to be a judge, courts in Australia have had to grapple with this problem on a number of occasions. There are difficulties in determining the point at which a person becomes absorbed into the Australian community so as to pass beyond the reach of the immigration power, but it seems clear beyond much doubt that Isaacs' sweeping and illiberal doctrine 'once an immigrant, always an immigrant' does not represent the law.[80] In describing Isaacs' doctrine as illiberal, it is fair to say that the description applies more aptly to the doctrine than to the judge, for what Isaacs was concerned to assert, here as elsewhere, was the widest ambit for federal power, without regard to the merits of the particular exercise of that power.[81]

No Commonwealth power occupied the attention of the court during Isaacs' term more frequently and more demandingly than the industrial arbitration power, section 51 (xxxv), which authorized the making of laws by the Commonwealth parliament with respect to conciliation and arbitration for the prevention and

[79] at pp. 81-2.

[80] See Lane: 'Immigration Power' (1966) 39 A.L.J. 302; Finlay: 'The Immigration Power Applied' (1966) 40 A.L.J. 120.

[81] See Sawer: Australian Federal Politics and Law 1901-1929, at p. 255.

settlement of industrial disputes extending beyond the limits of any one State. The clause made its appearance in the constitution on the initiative of Higgins in 1898; it kindled little interest and its complex terminology reflected the problems which Higgins had in mind for federal control. During the nineties there were major industrial disputes in the shearing and maritime industries which were truly interstate in character. Isaacs had supported Higgins' proposals, and he took an active part in the debate on the Conciliation and Arbitration Act which became law in 1904. That bill had been the wrecker of governments, notably in respect of the proposal to include the industrial employees of the State, and the clause which subjected them to the operation of the Act was held unconstitutional in the *Railway Servants' Case* which in due course was overruled in the *Engineers' Case*. Isaacs' developed view was that State employees and industries were subject to the jurisdiction of the federal arbitration authority, though, as we have seen, as a politician he doubted the wisdom, if not the constitutionality, of seeking to subject the States and State instrumentalities to this jurisdiction.

Within the limits of a broad definition of arbitration—which excluded the making of a common rule for an industry which was 'foreign to arbitration'—Isaacs consistently supported broad interpretations of the power. As he put it in 1923:

> The Commonwealth Conciliation and Arbitration Act is not a penal Act; nor is it at all proper to regard it simply as imposing obligations or impairing rights. To regard it so would be to mistake its real import. It is a statute embodying a great public policy. Its purpose —of which the advantages or disadvantages are quite outside the province of a court to discuss, since its inscription on the Statute Book is the declared national will—is to encourage and maintain industrial peace in the Commonwealth.[82]

Griffith and Barton would never have described the Act in that way: they consistently gave narrow interpretations to federal power in this field and imported into their interpretations the cherished doctrine of reserved State powers. In a later generation Knox and Gavan Duffy were to fall heirs to this restrictive approach (though not on the basis of reserved State powers) and they not

[82] *George Hudson Ltd v. Australian Timber Workers' Union* (1923) 32 C.L.R. 413, at p. 434.

infrequently dissented from the sweeping interpretations of the power by Isaacs.

The questions for the court arising under the arbitration power were many. There was, in the first place, dispute over the character of the arbitral function itself. The problem arose in diverse contexts: it had important practical applications in the determination of the question of the relationship between a federal award and an inconsistent State law regulating industrial conditions. In Griffith's view, the arbitral function was essentially judicial in character, and he dismissed with almost incredulous contempt the argument that a federal award could prevail over a State statute or a prescription of industrial conditions by such a body as a Victorian Wages Board made pursuant to the authority of a State statute. To Isaacs, the contrary conclusion was patently correct. As early as 1910 he stated his view that the arbitral function was essentially of a legislative character in that it prescribed for the future what should be the mutual rights and obligations of the parties.[83] The statute, the Conciliation and Arbitration Act, gave legal efficacy to the award of the arbitrator, and as Isaacs put it in a later case 'stamps his decision with the character of a legal right or obligation. Parliament legislates but is compelled by the constitution to legislate in that way.'[84] By force of the federal Act the award became part of federal law which by the authority of section 109 of the constitution prevailed over inconsistent State law. In the early cases, he stated this doctrine in dissent; not surprisingly he protested that the majority view gave 'the most attractive facilities to the several States to place insuperable obstacles in the path of national action when national interests are most in danger'.[85] His view prevailed, however, in the long run, and in *Clyde Engineering Co. Ltd v. Cowburn*[86] the court held, by reference to his analysis of the character of arbitration, that a federal *award* prescribing rates of pay and overtime based on a working week of forty-eight hours prevailed over a later New South Wales *statute* purporting to apply to persons bound by the Commonwealth award which prescribed a working week of forty-four hours

[83] *Australian Boot Trade Employees Federation v. Whybrow & Co.* (1910) 10 C.L.R. 266.

[84] *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd* (1918) 25 C.L.R. 434, at p. 463.

[85] *Whybrow's Case* (1910) 10 C.L.R. 266, at p. 327.

[86] (1926) 37 C.L.R. 466.

and made provision for the adjustment of rates of pay and overtime accordingly.

Isaacs also gave strong support to the view which quite early established that an industrial dispute might be created by paper demands which came to be known as a log of claims, the service of which typically began proceedings in the arbitration jurisdiction. This was adopted over protests and dissents by Griffith and Barton who asserted, consistently with their narrow view of federal power in this field, that jurisdiction could not be attracted by such devices. But while it came to be accepted that the service of paper claims might create a genuine industrial dispute, it was open to parties to show that in a particular case there was, in fact, no genuine dispute. In his last year on the Bench in the *Caledonian Collieries Case (No. 2)*[87] Isaacs dissented from the view of the majority that the paper demands did not disclose a genuine dispute. Ever sympathetic to the extension of this jurisdiction, he asserted that the majority view failed to take account of the industrial realities. In the earlier *Caledonian Collieries Case (No. 1)*[88] he had dissented for similar reasons from the majority view that the facts did not disclose an *interstate* industrial dispute, for it was only to such disputes that the jurisdiction conferred by section 51 (xxxv) of the constitution extended. But, more generally, on the issue of what constituted an interstate industrial dispute, the wider approach of Isaacs prevailed over the narrower and more restrictive views of Griffith and Barton. It seems that the interstate disputes which Higgins, the author of the Commonwealth power, had in mind in proposing the clause were those arising in an obviously interstate sense, as for example in Australia-wide industries like the pastoral and maritime industries. But what of a case like the *Builders' Labourers' Case*[89] in 1914, where the builders' labourers who had formed a federal union in 1910 caused logs of claims to be served on employers in various States? Griffith and Barton took the view that it was not possible to regard this as an interstate dispute; building operations were essentially localized so that what had arisen was a number of intrastate disputes. Isaacs, a member of the majority, said that this misconceived the matter.

> The industrial disputes referred to in the constitution are disputes which at the given moment are seen to possess, besides their industrial quality, a certain indispensable character of extent. They are

[87] (1930) 42 C.L.R. 558.
[88] (1930) 42 C.L.R. 427.
[89] (1914) 18 C.L.R. 224.

industrial disputes which at the moment do in fact *extend* beyond the limits of any one State, that is, which *cover Australian territory* that is not confined to the limits of any one State. They may originate in one part or several parts of the Commonwealth. . . .

If a given industrial dispute answers the requisite geographical character, it is *ex vi termini* not a 'State' dispute. It is, when considered in its integrity, neither a single nor a multiple State dispute, nor a *fasciculus* of separate State disputes; it is an *Australian dispute*, and cognizable as such by the Commonwealth authority.[90]

In the 1920s Isaacs supported further expansive interpretations of the Commonwealth power. In the *Burwood Cinema Case*[91] the question was whether the Arbitration Court might constitutionally take jurisdiction where a union demand was made on employers not employing union labour and whose employees had expressed no discontent with their conditions. There was earlier authority unfavourable to this exercise of jurisdiction, on which Knox and Gavan Duffy, dissenting, relied. But Isaacs speaking for the majority swept aside the earlier case. The argument against the jurisdiction was characterized as 'absurd':

> If adopted in this case as a basis of decision and consistently applied, it would reduce federal arbitration to futility. . . . If the section 51 (xxxv) of the Australian constitution is to be faithfully applied in the broad sense already adopted, so as to be effective to cope with the destructive evil of industrial warfare—an evil which, if unchecked, would threaten all national welfare—it must necessarily be competent to provide by conciliation and arbitration for the 'essential condition' referred to. That is to say, while the 'common rule' as one extreme is excluded, so a limitation to individual contract as the other extreme is also excluded. Employers who voluntarily enter and compete in the same field of industry and thereby affect the industrial relations of all others on that field—unionist and non-unionist—cannot escape the result of their voluntary action by merely excluding union labour. So far as the constitution is concerned, the objection to the jurisdiction fails.[92]

So, with sledge-hammer blows, Isaacs led the court to ever wider definitions of the jurisdiction. This case and the *Metal Trades*

[90] at p. 243. Italics are Isaacs' own.

[91] *Burwood Cinema Ltd v. Australian Theatrical and Amusement Employees Association* (1925) 35 C.L.R. 528.

[92] at pp. 539, 541.

Case,[93] decided some five years after Isaacs had left the Bench, were historic decisions which, as summarized by a High Court judge of a later generation, 'brought a great part of the Australian economy directly or indirectly within the reach of Commonwealth industrial law and the jurisdiction of the Commonwealth industrial tribunal'.[94] That estimate certainly accorded with Isaacs' intention.

There remained the definition of 'industrial' disputes, and once again Isaacs argued for the broadest definition. In *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation*[95] he was in the majority, holding over the dissent of Griffith and Barton that municipal corporations established under State law were, in respect of the functions of making, maintaining, controlling and lighting public streets, subject to the jurisdiction conferred by section 51 (xxxv). Questions were raised touching the amenability of such public authorities to the jurisdiction—the *Engineers' Case* had not yet been decided—and in defining 'industrial', Isaacs insisted, with copious reference to parliamentary papers, the writings of economists and social scientists, and to case authority, that there was 'overwhelming evidence'[96] that the jurisdiction was not to be confined to occupations involving manual labour or to undertakings carried on for profit. As Isaacs put it:

> Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation.[97]

In the *Banking and Insurance Staffs' Case*,[98] the court, over the dissent of Knox and Gavan Duffy, held that a dispute between employers carrying on the business of banking or insurance and their employees was an industrial dispute within the meaning of section 51 (xxxv). Isaacs developed the reasoning of the *Municipal Employees' Case*, and said that it was impossible to confine the jurisdiction to manual workers; on the tests propounded in the earlier case, banking and insurance were indispensable parts of

[93] *Metal Trades Employers Association v. Amalgamated Engineering Union* (1935) 54 C.L.R. 387.

[94] *per* Windeyer J. in *Ex parte Professional Engineers' Association* (1959) 107 C.L.R. 208, at p. 268.

[95] (1919) 26 C.L.R. 508.

[96] at p. 565.

[97] at p. 554.

[98] (1923) 33 C.L.R. 517.

the general industrial mechanism. If such disputes were excluded from the ambit of industrial disputes 'the Commonwealth Arbitration Court would be strewn with wrecks'.[99]

He lost his last battle on this front. In *Federal State School Teachers' Association of Australia v. Victoria*[1] the majority held over Isaacs' elaborate dissent that the educational activities of the States carried on under State statutes and regulations did not constitute an industry, so that the occupation of State school teachers was not industrial within the meaning of section 51 (xxxv). Once again, with copious citation of legal authority and the writings of economists and others, Isaacs insisted that the majority view led back to:

> the dark ages of industry and political economy. . . . It erroneously conceives the object of national industrial organization and thereby unduly limits the meaning of the terms 'production' and 'wealth' when used in that connection. But it further neglects the fundamental character of 'industrial disputes' as a distinct and insistent phenomenon of modern society. Such disputes are not simply a claim to share the material wealth jointly produced and capable of registration in statistics. At heart they are a struggle, constantly becoming more intense, on the part of the employed group engaged in co-operation with the employing group in rendering services to the community essential for a higher general human welfare to share in that welfare to a greater degree.[2]

The majority view in the *State School Teachers' Case* almost certainly still states the law, though it may be that teaching carried on for private profit answers the description of an industrial occupation within the scope of section 51 (xxxv).[3] If it is so, it adds another unsatisfying complexity to this area of the law. For his part Isaacs himself in the *State School Teachers' Case* maintained another distinction, at least as unsatisfactory, which he had stated earlier, when he distinguished between Crown officers who were

[99] at p. 526. In 1917 Isaacs, sitting in the arbitration jurisdiction, made an award in a dispute between the Australian Journalists' Association and the newspaper proprietors. The proprietors did not take the point that journalism was not an industrial occupation, and this drew warm commendation from Isaacs. His award won for him the lasting admiration and goodwill of the Journalists' Association. See Gordon: Sir Isaac Isaacs, at pp. 135-7.

[1] (1929) 41 C.L.R. 569.

[2] at pp. 577-8.

[3] *Ex parte Professional Engineers' Association* (1959) 107 C.L.R. 208; and see Eggleston: 'Industrial Relations' in Essays on the Australian Constitution, at p. 230.

administering true and essential governmental functions and were therefore not subject to the arbitration jurisdiction and those performing other duties, particularly trading employees. He held that the teachers fell into the latter category and were therefore amenable to the arbitration jurisdiction. With characteristic emphasis he said that 'there is a line of demarcation inherent in all British constitutions which inexorably divides the two classes of case'.[4] This distinction was relied upon in a later *Professional Engineers' Case*[5] to support the argument that professional engineers in the service of the States were performing Crown functions which did not bring them and their State employers within the ambit of the arbitration jurisdiction. The High Court rejected Isaacs' 'inexorable' distinction. As Sir Owen Dixon put it:

> it is a line of demarcation which I have never been able to trace for myself in what may be described as the applied constitutional law or practice of today or to discover in legal history. In all the developments of modern times it seems better to read s. 51 (xxxv) of the constitution without reference to such preconceptions.[6]

That is plainly right; it is odd that Isaacs should have persisted in such a distinction, for he above all other judges of his generation might have been expected, having regard to his social philosophy and his extensive readings in the social sciences, to assert that the expanding functions of the modern State could not be subject to such unsatisfactory classifications and distinctions.

Isaacs' interpretations of section 51 (xxxv) exhibit in a very striking way his devotion to the cause of the expanding national power. There were few cases in which he put a brake upon it. He held common rule provisions to be 'foreign to arbitration'. In *Alexander's Case*[7] he held the enforcement provisions in the Conciliation and Arbitration Act to be invalid, because, as the Arbitration Court was then constituted, they offended against his reading of the Judicature Chapter of the constitution which required federal judges to hold office for life. But despite his strenuous efforts to give the arbitration power a very wide ambit, he was acutely conscious of the difficulties which arose from the very terms of section 51 (xxxv). He did not stand alone in this; federal governments had unsuccessfully sought

[4] (1929) 41 C.L.R. 569, at p. 584.

[5] *Ex parte Professional Engineers' Association* (1959) 107 C.L.R. 208.

[6] at p. 235.

[7] *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd* (1918) 25 C.L.R. 434.

amendments to the constitution to free the power of some of its complexities and limitations. In 1926, the Bruce-Page government, in a time of difficult industrial relations, unsuccessfully proposed such an amendment to the electors, and in frustration, in 1929, Bruce announced the government's intent, except for special cases, to give up federal activity in this area. The government fell on this proposal, and it did much to bring Bruce down in the subsequent election of 1929.[8]

Early in 1939, after his retirement from public life, Isaacs proposed various amendments to the constitution, one of which called for a new section 51 (xxxv) to read 'Industry, including the prevention and settlement of industrial disputes',[9] and he explained this in part by the existing restrictions on the Arbitration Court's power and in part by the limitations on legislative action. 'A court is not in the position to deal with the matter without reserve from the standpoint of policy.'[10] He also gave strong support to later proposals for similar amendments, and he shared the disappointment of a distinguished company who have at various times in the history of the Commonwealth failed to persuade either the electorate or, on occasion, the government of the case for amendment to the constitution in this respect.

Few provisions of the constitution have given rise to more protracted and often unsatisfactory examination in the courts than section 92 which provides that 'trade, commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free'. The breadth of this language posed very difficult problems of interpretation, of which Isaacs warned as a member of the convention in 1897-8. In 1897 he said that this language made the clause 'very dangerous', and that it contained expressions which were 'extremely large and alarming'. In 1898, when discussion on the clause was renewed, he raised his objections once more and was met by Reid's flat statement that this laymen's language served the purpose admirably.[11]

Whatever difficulties Isaacs may have had with the clause as a founding father, they disappeared when he came to consider the operation of the section as a judge. Its importance and purpose became very clear; it gave expression to 'what I regard as one of the

[8] See Sawer: Australian Federal Politics and Law 1909-1929, at p. 331.

[9] Australian Democracy and Our Constitutional System (1939) at p. 37.

[10] at p. 39.

[11] see p. 68 above.

fundamental facts of the constitution under which we live'.[12] Writing on constitutional matters in retirement in 1939 he spoke of section 92 as one of the 'two central pillars around which the Australian people build their nationhood'.[13] Later in the same year he wrote at great length to demonstrate the error into which the Privy Council and the High Court had fallen in departing from his interpretations of the section, and he spoke in this context of the 'ill fated and apparently the still unfathomable section 92'.

Isaacs reached his settled views on section 92 in *W. & A. McArthur Ltd v. State of Queensland*[14] in 1920. That case was decided in the same year and is reported in the same volume of the Commonwealth Law Reports as the *Engineers' Case*. The style reveals clearly that Isaacs wrote the majority judgment. The doctrine stated in that case was that section 92 invalidated all interference by the *States* with the activities which constituted interstate trade, but that it did not in any way control the activities of the *Commonwealth* which, in the national interest, had been invested with power to legislate with respect to interstate trade and commerce.

This involved, in part, a change of mind, for on earlier occasions Isaacs had asserted the contrary proposition with his customary vigour and definiteness, so far as the relationship of section 92 to Commonwealth legislation and action was concerned. In 1909 in *Fox v. Robbins*[15] he said that 'Sec. 92 was made an organic law operating of its own force—and not capable of being modified or weakened in any degree by any parliament, whether Commonwealth or State'. In 1912, he described it as an absolute prohibition on Commonwealth and States alike.[16] In *Farey v. Burvett*,[17] in 1916, he took the example of section 92 to illustrate the proposition that the wartime defence power of the Commonwealth was not subject to such constitutional limitations. He contrasted this with the ordinary peacetime situation: at such times the section 'in the most positive terms places beyond Commonwealth and State control alike the freedom of all interstate commerce and intercourse'. In *Duncan v. State of Queensland*[18] in the same year, he once again

[12] *Duncan v. State of Queensland* (1916) 22 C.L.R. 556 at p. 605.

[13] Australian Democracy and Our Constitutional System (1939) at p. 40. The other pillar was the defence power.

[14] (1920) 28 C.L.R. 530.

[15] (1909) 8 C.L.R. 115, at p. 128.

[16] *R. v. Smithers* (1912) 16 C.L.R. 99, at p. 117.

[17] (1916) 21 C.L.R. 433, at p. 454.

[18] (1916) 22 C.L.R. 556, at p. 618.

said that the Commonwealth was subject to the section, and pointed out that there was no irreconcilable conflict between the grant of legislative power to the Commonwealth with respect to interstate trade and commerce (section 51 (i)) and the prohibition imposed by section 92.

> There is [he said] a very large field for legislation with respect to interstate trade and commerce, for its regulation so as to preserve its freedom, to encourage and promote it, in entire accordance with sec. 92.

In *McArthur's Case* this was swept aside. The far-reaching operation assigned to the section, so far as State legislation and activity were concerned, was now seen to raise insuperable difficulties if applied to the Commonwealth. In this case Isaacs said that it had become necessary to examine the scope and meaning of section 92 more closely than ever before—though to be sure, the examinations in some of the earlier cases and notably in *Duncan's Case* had been detailed and elaborate. This reconsideration led to the conclusion that the 'dicta in previous cases' were wrong, and that 'incautiously and unnecessarily interpolated observations' with reference to the application of the section to the Commonwealth must now be corrected. A comprehensive view of the constitutional scheme showed that section 92 was intended only to have operation in the context of State legislation and action, and that any attempt to apply it to the Commonwealth would be 'mischievous [and] . . . would, in our opinion, practically nullify sec. 51 (i) altogether'.[19] Isaacs found little difficulty in slaying the dragons of his own creation, but this one, as we shall see, was to rise again.

The definition of the scope and operation of section 92 in *McArthur's Case* was built up in cases involving State legislation. *Farey v. Burvett*, exceptionally, concerned Commonwealth legislation, but Isaacs there referred to section 92 simply to illustrate the amplitude of the wartime defence power. The first of the cases directly concerned with section 92 on which Isaacs sat, was *Fox v. Robbins*[20] in 1909. That case was simple: a Western Australian Act charged differential fees for licences to sell wine and the fee payable for a licence to sell Western Australian wine was lower than the fee payable in respect of wines from other States. The court was unanimous in holding the Act invalid by reference to section 92;

[19] *McArthur v. State of Queensland* (1920) 28 C.L.R. 530, at p. 538.

[20] (1908) 8 C.L.R. 115.

as Isaacs put it, there was a patent fiscal discrimination. The second case,[21] in 1912, involved freedom of interstate intercourse rather than trade or commerce. A New South Wales Act excluded from that State persons who were non-residents of New South Wales who had been convicted in other States of certain criminal offences. Griffith and Barton held the Act bad not by reference to section 92, but on the ground that the federal constitution by its very character severely restricted State power to deny such freedom of intercourse. Isaacs and Higgins held squarely that the Act infringed section 92, and Isaacs revealed his approach to the interpretation of the section. He met the argument that the New South Wales Act should not be characterized as one with respect to interstate intercourse, but rather with respect to the health and morals of the State, with the answer that in fact it directly denied freedom of intercourse and that sufficed to attract the operation of section 92.

> In my opinion, the guarantees of interstate freedom of transit and access for persons and property under sec. 92 is absolute—that is, it is an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians.[22]

On three occasions during the first world war, the High Court considered the applicability of section 92 to State legislation. In *New South Wales v. The Commonwealth*[23] (the *Wheat Case*) the New South Wales Wheat Acquisition Act, which provided that the Governor might declare that any wheat referred to was acquired by the Crown and that such wheat should become the property of the Crown and the rights and interests of persons affected should be converted into claims for compensation, was held not to offend against the section. The court agreed that section 92 did not deny power to the State to acquire or expropriate property in this way. The terms in which the judges stated this proposition varied somewhat: Griffith put it in very general terms, while Isaacs was concerned to point out that in this acquisition scheme there was no specific interference with interstate trade. He put it that:

> when a State deals with property on the basis of property and regulates its ownership irrespective of any element of interstate trade, there is no abridgement of absolute freedom of trade.[24]

[21] *R. v. Smithers* (1912) 16 C.L.R. 99.

[22] at p. 117.

[23] (1915) 20 C.L.R. 54.

[24] at p. 100.

The two cases which followed were in flat contradiction. In *Foggitt Jones & Co. Ltd v. New South Wales*[25] and *Duncan v. State of Queensland*[26] meat control Acts of New South Wales and Queensland respectively did not acquire stock and meat outright for the armed forces and civilian use, but imposed 'stop' orders preventing the movement of stock, etc. by owners, and authorized governmental acquisition of such stock for the Crown at dates subsequent to the stop orders. In *Foggitt Jones*, the court held that the Act infringed section 92, because it simply prevented the owners of stock from moving them across State borders without affecting their ownership. Isaacs said that the legislation was specifically directed at the acts of exporting stock and meat interstate and that was expressly forbidden by section 92.

> Detention in order directly or indirectly to prevent or regulate commercial operations between the States, however carefully it is phrased and however meritorious may be the impelling motive, is to my mind in open conflict with sec. 92 of the constitution. That section makes Australia one indivisible country for the purposes of commerce and intercourse between Australians.[27]

Then in *Duncan's Case* the majority overruled *Foggitt Jones*, holding that if outright acquisition was valid, so should be the lesser step of holding the meat in the State pending acquisition. Isaacs and Barton dissented and Isaacs, at great length and with much vehemence and rhetoric, protested against what he regarded as the most obvious and direct violation of section 92: the specific prohibition of disposal by an owner of his own goods by passing them across a State border without the consent of a minister. 'I am utterly unable to comprehend the reasoning by which this position is held to be consistent with interstate trade, commerce and intercourse being absolutely free.'[28]

Subject to the qualification that section 92 was now held not to affect the Commonwealth, Isaacs' views, as stated in dissent in *Duncan's Case*, became the doctrine of the court in *McArthur*. The Queensland legislature in 1920 fixed maximum prices for the sale of certain goods in Queensland, and the Act regulated all sales uniformly without reference to any distinction between inter- and intrastate transactions. The plaintiff company was registered in New South Wales; it had no stocks in Queensland and did business

[25] (1916) 21 C.L.R. 357.
[26] (1916) 22 C.L.R. 556.
[27] at p. 365.
[28] (1916) 22 C.L.R. 556, at p. 617.

in Queensland through travellers who offered goods for delivery at prices higher than those fixed by the Act. It was in respect of such transactions, that is to say contracts for the sale of goods specifically to come *interstate* from New South Wales for sale in Queensland, that the court held section 92 to apply, with the consequence that the provisions of the Queensland Act could not apply to them. Isaacs put it that the acts and transactions of which interstate trade and commerce consisted must be left *absolutely* free. It is important to appreciate the precise point for an understanding of *McArthur's Case*; it was only such acts and transactions that were beyond regulation. The holding in *McArthur*, therefore, was that the Queensland Act was inoperative *only to that extent*. Acts, other than the acts of interstate trade, were subject to State regulation: for example an interstate carrier had no licence to commit crime within the State, and he must obey all laws other than those which were part of the act of trade.

McArthur's Case assigned to section 92 a far-reaching operation within a limited area, definable as the act of trade. The act of interstate trade was held by the court in *Commonwealth v. South Australia*[29] to be affected by a State tax on the first sale of petrol in South Australia. The tax was imposed to provide revenue for road maintenance. It was held by the majority, including Isaacs, that as the greater part of the petrol sold in South Australia was imported so that the first seller was generally the importer, the tax was indistinguishable from a customs duty and in respect of petrol brought in from other States was an infringement of section 92. Isaacs squarely held that the tax was on the act of trade, and therefore invalidly imposed under the *McArthur* doctrine. In 1928, however, there were sharp differences in the court in *Ex parte Nelson*.[30] A New South Wales Act prohibited the importation of stock from a district of Queensland where there was reason to believe that infectious stock disease existed. The court was equally divided on the issue, though Isaacs made it abundantly clear that he had no doubt of the correct answer.

> It is gravely argued on behalf of the State, and this court is seriously asked to hold, that these two provisions (section 92 of the constitution and the State Act), which to the ordinary mind are in obvious polaric opposition, are nevertheless legally reconcilable with each other.[31]

[29] (1926) 38 C.L.R. 408.

[30] (1928) 42 C.L.R. 209.

[31] at p. 200.

Despite this intimidating language three judges, including the Chief Justice, Knox, found the Act and the section legally reconcilable. Whereas Isaacs held that the State law struck at the very act of trade, the three judges taking the contrary view spelled out of *McArthur's Case* the proposition that a person who brings goods into a State cannot claim freedom in respect of them from laws *on other subjects*, and they concluded that the law in question was properly characterized as one with respect to health or quarantine and not the regulation of interstate trade.

While there were some uncertainties of expression in the earlier cases, it does not seem that this was the thrust of *McArthur's Case*, and it was certainly not what Isaacs meant in that case. If a law was in terms directed against the very act of trade, as the Act in *Nelson* plainly was, it infringed section 92, whatever the broader purpose of the enacting legislature. It was another thing if the law had penalized a person for being in possession of diseased stock *within* the State, but the Act was not drawn in that way. *Nelson's Case* was important then in two respects: it disclosed differences in the actual characterization of the act of trade, and perhaps more subtly it showed that members of the court while verbally relying on the authority of *McArthur's Case* were in fact moving away from it. There had been earlier suggestions of this in *Roughley v. New South Wales*[32] which concerned the validity of New South Wales legislation regulating the activities of produce agents who handled produce in Sydney markets.

A series of marketing cases, in which the central figure was the South Australian dried fruits grower James, raised a variety of questions involving section 92. James fought to establish his right to sell his dried fruits freely on the Australian market, which in practical terms for him meant interstate sales. This brought him into conflict with State marketing policies reflected in legislation designed to restrict access to the more profitable domestic markets by compelling all growers to accept the same share of the less profitable export market. Under South Australian legislation, action was taken to prevent James from sending more than a specified proportion of his product interstate. The Act did not control interstate dealings as such; it regulated quantities sold anywhere in Australia, but as James was actively engaged in interstate trade, it struck

[32] (1928) 42 C.L.R. 162. In that case, Isaacs held that the plaintiffs had not clearly shown that they were acting as agent for interstate parties, and this analysis was wholly consistent with his reading of *McArthur*.

directly at that trade. In *James v. South Australia*[33] it was held by the whole court, including Isaacs, that so far as the Act authorized a Board to determine the quantity of dried fruit produced in South Australia which might be marketed anywhere in Australia, it infringed section 92. The Commonwealth stepped into the breach and enacted legislation in 1928 imposing domestic quotas. On the authority of *McArthur's Case* it was held that this did not infringe section 92, which did not bind the Commonwealth, but the legislation was held invalid on other grounds.[34]

In *James v. Cowan*,[35] James' fruit was compulsorily acquired under the South Australian legislation which authorized such an acquisition and the subsequent marketing of the acquired product by a State Board. The consequence of the acquisition was that James was left without fruit to fulfil his interstate contracts, and he claimed that this was prohibited by section 92. The lion in the path was the *Wheat Case* which had held the acquisition of property by government to be consistent with section 92, and the majority in the High Court sustained the validity of the seizure on this basis. Isaacs vigorously dissented in a lengthy and elaborate judgment—how these words recur—in which he insisted that the *Wheat Case* did not support this acquisition. In the *Wheat Case*, he said, he had expressly upheld the acquisition because it was general and did not expressly or implicitly refer to interstate trade or commerce, either as a criterion of authority or as a description or attribute of the property to be acquired. Here, to the contrary,

> we have a statute which is the very antithesis of the *Wheat Acquisition Act*. It makes the repression of interstate trade the *causa causans* of the expropriation, which is only the *means* selected to carry out effectively the attempted control of the interstate trade.[36]

This was Isaacs' last judicial pronouncement on section 92; by the time *James v. Cowan* reached the Privy Council, he was Governor-General. He had the satisfaction of seeing the High Court judgment reversed, and the Privy Council declared itself to be 'in accord with the convincing judgment delivered by Isaacs J.'[37] But there were some disturbing aspects of the judgment; the Privy Council expressly left open the question whether section

[33] (1927) 40 C.L.R. 1.
[34] *James v. Commonwealth* (1928) 42 C.L.R. 62.
[35] (1930) 43 C.L.R. 386.
[36] at p. 415.
[37] [1932] A.C. 542, at p. 561.

92 should be held to bind the Commonwealth, and there were other statements which were relied on by the High Court in subsequent transport cases to support conclusions which, in Isaacs' view, were plainly contrary to what had been decided in *McArthur's Case*. But Isaacs was, on the balance, satisfied with what the Privy Council had done in that case, and in 1939 he wrote that it was 'the last recorded curial decision not in conflict with the actual words of section 92 and the declared intention of the convention as to "absolutely free" on 11 March 1898'. He viewed the decisions of the High Court in the transport regulation cases, which began with *Willard v. Rawson*[38] in 1933, as destructive of the fundamental principle embodied in section 92. His protest at those decisions and at the decision in the later marketing case of *Hartley v. Walsh*[39] was vehement; the only light he saw in these cases was the dissent of Sir Owen Dixon whose words, he said, 'seem to me like the voice of a modern valiant but helpless prophet in the wilderness trying to call us back to the actual words of the constitution'. Events were later to show that Sir Owen was far from being a 'helpless prophet' when the Privy Council at length disapproved this line of transport cases.[40]

Isaacs' strongest criticism was reserved for the Privy Council's decision in *James v. Commonwealth*,[41] in 1936. Once again the Commonwealth had come to the aid of the States by establishing quotas for the domestic marketing of dried fruits. Since *James v. Cowan*, doubt had been building up in the High Court as to the validity of the proposition that section 92 did not bind the Commonwealth, and in *James v. Commonwealth* the Privy Council squarely overruled *McArthur's Case* on this point.

But beyond the demonstration that section 92 bound the Commonwealth, the Privy Council disapproved the definition in *McArthur's Case* of the freedom assured by the section. That decision, it was said, 'deprived Queensland of its sovereign right to regulate its internal prices'. The freedom which section 92 assured must be more narrowly confined, and the true criterion was defined as 'freedom as at the frontier'.[42]

Isaacs' displeasure at the Privy Council decision was very great. After brief acknowledgment of the authority of that tribunal,

[38] (1933) 48 C.L.R. 316.
[39] (1937) 57 C.L.R. 372.
[40] *Hughes and Vale Pty Ltd v. New South Wales* [1955] A.C. 241.
[41] (1936) A.C. 578.
[42] at pp. 618, 630.

he proceeded to assail the decision on the grounds of a misreading of history and authority, and above all because it left the law in a thoroughly uncertain and unsatisfactory state. He set this out at length in 1939 in his arguments in favour of constitutional amendment. Section 92, he said:

> was to take for ever out of the hands of every State the power to control, obstruct or in any way interfere with the subjects named, that is to say the 'trade, commerce and intercourse' between Australians that were, equally with defence, matters of national concern, because they were 'among the States', or in other words they concerned more than one, and perhaps all of the States. . . .
>
> In 1936, in what is called the second Dried Fruits case the Privy Council overruled the opinion in *McArthur's Case* and annulled the Act in question. When pressed with the argument that to apply section 92 to the Commonwealth would present a direct conflict between two sections in the constitution the Privy Council held that you could not read the words literally. They held that 'absolutely' should be disregarded, and that 'free' did not protect the interstate trade all the way if it travelled from say, Brisbane to Perth, but only at the points, some of them astronomical, where it crossed the borders. Short of doing something to prevent the goods . . . from crossing the border, the States could deal with them just as before federation subject to the Commonwealth making a contrary law as to trade. . . .
>
> . . . There is an element of incompleteness and almost of absurdity in 'guaranteeing' a consignment of goods from say Melbourne to Brisbane to be free to cross the borders of the three States, but everywhere else to be subject to three sets of varying State regulations until the Commonwealth follows up the provincial pre-federal antagonisms by an undiscriminating national regulation.[43]

The amendment he proposed to section 92 would have made the section read:

> trade, commerce, and intercourse among the States whether by means of internal carriage or ocean navigation, shall throughout the Commonwealth be absolutely free from the legislative and executive control of any State.[44]

There was much that was unsatisfactory in the Privy Council's decision in *James v. Commonwealth*. It was a cloudy judgment, which left areas of doubt as to what survived as authority, and the

[43] Australian Democracy and Our Constitutional System (1939) at pp. 40, 42, 44.
[44] at p. 38.

statement of principle was far from clear and difficult of application. The dealing with *McArthur's Case* was not satisfactory: it did not do justice to the High Court's judgment in that case and to the difficulties which arise from the language of section 92 to say simply that the decision deprived the State of its sovereign right to regulate its internal prices. The High Court has since dealt with the problem of State price-fixing and while supporting the view that *general* price-fixing is not an infringement of section 92, has pointed out that *McArthur's Case* did not decide that it was, but held that particular acts and transactions could not, because of their character as acts of interstate trade, be subject to such State legislation. In this specific context, *McArthur's Case* may still stand as authority.[45] On the other hand the holding that section 92 binds the Commonwealth, so angrily repudiated by Isaacs, seems right and his historical demonstration to the contrary is not convincing. The area of intra-Australian 'freedom' which the section assured should surely be protected against Commonwealth as well as against State interference. There is little justification for a conclusion which would have allowed the Commonwealth to place on Mr James the restraints that the States were denied power to impose. But to Isaacs, the nationalist, who saw all the difference in the world between Commonwealth regulation and restraint and comparable State action, this was egregious error.

Isaacs was, of course, concerned as a judge with many other areas of constitutional interpretation; with definitions of the character of judicial power, the tenure of federal judges, the character of federal jurisdiction and the validity of complex provisions of the Judiciary Act.[46] He was concerned with the definition of federal powers other than those which have been specifically considered, and to this task he brought the same strong sympathy for the national power. Even though in the *Engineers' Case*, and for particular reasons, he downgraded the relevance of American authority to the interpretation of the Australian constitution, he nevertheless made copious reference to American cases in aid of conclusions to which he relentlessly marched. The massed authority served to make even more invincible the propositions which he stated so dogmatically and often with such appalling certainty.

It is almost forty years since Isaacs left the Bench and the passage of time itself has naturally diminished the frequency of reference

[45] see *Wragg v. State of New South Wales* (1953) 88 C.L.R. 353.

[46] see p. 140 above.

to Isaacs' judgments, even where the current doctrine represents a more or less continuous development of his views. The cases cited tend to be those of a later generation, though, of course, there is quite frequent reference to the great historic cases in which he took part. But more important, there has been a change of course. Even in his own day he stood apart from his brethren in the single-mindedness of his devotion to the cause of advancing the national power. No one came with him all the time and all the way. In the time since he left the Bench, the change of course is explained, substantially anyway, by the influence of Australia's greatest judge, Sir Owen Dixon, whose readings of the constitution have differed in significant respects from those of Isaacs. His consistent national emphasis has been overlaid by one which reveals an equal determination to respect the *federal* balance in the constitution. This places restraints on the exercise of national power which Isaacs would have vehemently rejected. In the context of section 92, though Isaacs applauded the interpretations of Dixon in the transport and in the later marketing cases, he, Dixon, was in fact constructing a new doctrine which, while giving section 92 an operation on Commonwealth and State action alike, prescribed as a sole test of its operation whether the law in question imposed 'a duty to act or forbear in reference to or in consequence of an event or thing which is itself part of trade, commerce or intercourse'. This was to set the course for the future. Such developments have meant that while Isaacs made significant contributions to the interpretation of the constitution, both historically and in terms of actual doctrine, his influence in this field has considerably diminished.

8

Governor-General of the Commonwealth of Australia: 1931-1936

ISAACS took the oaths of office as Governor-General of the Commonwealth of Australia on 22 January 1931. The oaths were administered in the Legislative Council Chamber in Melbourne by Sir Frank Gavan Duffy who was that day appointed Chief Justice of the High Court in succession to Isaacs.

For months there had been great controversy over the appointment of Isaacs. Early in 1930, the retiring Governor-General, Lord Stonehaven, had informed the Prime Minister, Mr Scullin, that the United Kingdom government would welcome an Australian indication of a suitable successor to the office of Governor-General. It had been customary that the Prime Minister of the United Kingdom should consult informally with the Dominion government concerned before submitting the names of possible appointees to the King. In the case of Australia these had always been United Kingdom men who had attained high rank in the armed forces or had rendered other public service. Men like Sir Ronald Munro-Ferguson (Lord Novar) and Lord Stonehaven had played some part in United Kingdom politics.

The Imperial Conference of 1926 had examined some aspects of the office of the Governor-General of a Dominion. It declared that the Governor-General stood in all essential respects in the same relationship to his Dominion government as did the King in relation to the United Kingdom government. The Governor-General was the personal representative of the King in the Dominion; he was in no respect a representative of the United Kingdom government. The 1926 declaration went only so far; it said nothing as to the *procedure*, nothing as to the appropriate source of the *advice* on which the King might or should act in appointing a Governor-General.

Early in 1930, the Australian cabinet discussed the question of the succession to Lord Stonehaven. Sir Robert Garran, then Solicitor-

General of the Commonwealth, says that some time in February or March, the cabinet, after considering the names of Isaacs and Sir John Monash, decided to recommend Isaacs.[1] Monash, who died in October 1931, was a distinguished engineer and soldier, and though not a professional soldier, commanded the Australian Forces in France with distinction in the first world war. He later became chairman of the State Electricity Commission of Victoria and directed the large-scale electrification project of the State. Garran then says that Scullin cabled the recommendation of Isaacs to Ramsay MacDonald, the Prime Minister of the United Kingdom.[2] Sir Harold Nicolson in his life of King George V says that Scullin 'announced' that he intended to advise the King to approve the appointment of Isaacs.[3] No *public* announcement was made until the actual appointment was made by the King, and the Scullin government persistently refused to make any public statement on the appointment until that time. But rumours of the government's intention to advise the King to appoint Isaacs leaked out, and when Scullin was questioned in the House on 1 April on the appointment of the next Governor-General, he declined to give a direct answer.[4] At the end of the month, he said in the House that 'no change has been made in the traditional procedure connected with the appointment of a Governor-General'.[5] In the Senate, the government also declined to answer questions on the appointment of Isaacs.[6]

Despite these statements, reports of the recommendation appeared in the press. Late in April the Melbourne *Argus* said that it had learned authoritatively that the Scullin ministry was recommending Isaacs, and that there had been insistent Labour demands for the nomination of an Australian.[7] Scullin and the Dominions Office in London refused to comment on these rumours, and Scullin said that they had been circulated without any authority from Britain or Australia.[8] Mr (later Sir John) Latham, the leader of the Opposition in the federal parliament, said that the government's action disclosed its 'lack of enthusiasm' for the Empire and was prompted

[1] Garran: Prosper the Commonwealth, at p. 322.

[2] ibid.

[3] King George the Fifth; His Life and Reign (Constable 1952) at p. 478.

[4] Parl. Debs (H.R.) Vol. 123, at p. 704.

[5] ibid, at p. 1240.

[6] ibid, at p. 1201.

[7] 23 April 1930, at p. 7.

[8] Argus, 24 April 1930, at p. 7.

by 'strident and narrow jingoism'. This provoked Scullin's sharp retort:

> What kind of an Australian is Mr Latham when even the rumour than an Australian citizen may be chosen as the King's representative puts him into a frenzy? What a weird conception of Empire he must have when he suggests that the appointment of an Australian would weaken the ties of Empire.[9]

At the end of April there were newspaper reports that the King would not accept the Australian government's recommendation of Isaacs. Once again Scullin declined to comment on this report and said that 'the bandying of names and indulgence in public controversy are disrespectful to whoever may be appointed as the future representative of His Majesty'.[10]

The controversy in Australia grew louder. The Royal Empire Society opposed the appointment of an Australian and declared that judges should have nothing to do with politics. Representatives of organizations interested in imperial affairs met in Melbourne to discuss plans for concerted action to demonstrate that there was an 'emphatic demand'[11] in Australia that Governors-General should continue to be drawn from the United Kingdom. Non-Labour politicians declared their opposition to the appointment of Australians, and the fear was expressed that if Governors-General owed their appointments to the Prime Minister of Australia, there would be 'all sort of political tools and hacks subservient to political parties'[12] as occupants of the vice-regal office. A group of organizations described as the Council of Combined Empire Societies published a statement in which it was said that the Governor-General should not be associated with any Australian political party and that discontinuance of the practice of appointing United Kingdom men would deprive Australia of the service of men of distinction and experience. A petition by the Combined Societies protesting against the change in the method of appointment was circulated and with 130,000 signatures was sent to the Secretary of State for the Dominions.[13]

In England, the King saw Lord Passfield, the Dominions Secretary, and told him that the Australian recommendation of Isaacs

[9] Argus, 25, 26 April 1930.
[10] Argus, 29 April 1930.
[11] Argus, 30 April 1930, at p. 7.
[12] Argus, 3 May 1930, at p. 25.
[13] Argus, 13 June, 8 November 1930.

could not be accepted. The King's view was that the resolutions of the Imperial Conference in 1926 precluded the tendering of advice by the United Kingdom government on matters relating to the Dominions, including the appointment of a Governor-General. The 1926 resolution did not however say that such advice was appropriately tendered by a Dominion government. As Lord Stamfordham, the King's able and influential private secretary, wrote:

> I cannot for the life of me understand from anything that was passed at the last Imperial Conference that the Dominion governments have the right to advise the King on the appointment of Governors-General or indeed upon any other point.[14]

There had been some discussion of the matter by constitutional authorities in the United Kingdom. Edward Jenks, who had briefly been Dean of the Melbourne University Law School in the 1890s, wrote in 1927:

> Does it really mean that in future the government of the Empire is to fall into the hands of the King's private secretary? Put picturesquely —are Lord Stamfordham and his successors to 'run' the British Empire? I cannot conceive any rational foundation for such a suggestion. Who then is to advise the King upon the appointment of a Governor-General, say of Canada, Australia or New Zealand? The answer (I may be wrong) seems as a matter of principle to me to be reasonably plain, namely, that, just as the King in matters affecting the United Kingdom takes the advice of his Prime Minister in London, so in matters affecting Canada he will take the advice of his Prime Minister in the Dominion, and in the case of Australia that of his Prime Minister in the Commonwealth, and so forth. And I see no difficulty in applying the principle in that way.[15]

In the same year, Sir Arthur Berriedale Keith, a very dogmatic writer, stated a contrary conclusion:

> The suggestion that the King can act directly on the advice of Dominion ministers is a constitutional monstrosity, which would be fatal to the security of the position of the Crown. That His Majesty should on his personal discretion and responsibility accept or reject Dominion advice is absurd; but not less so the idea that he should serve the purpose of automatically registering the decrees of six or more independent governments, even if they conflicted with the

[14] Cited Nicolson: King George the Fifth, at p. 479.

[15] 3 Cambridge Law Journal, at p. 21.

interests of the United Kingdom, apart altogether from the delay and inconvenience involved in sending documents to London for formal signature.[16]

Keith's certainty on this as on so many points makes curious reading forty years on. But these two views show that constitutional authorities in the United Kingdom then differed in their views.

Opinions on the local position were given by Australian lawyers.[17] Latham stated his views in the House of Representatives on 5 December 1930, after the appointment of Isaacs had been announced:

> We have been informed that an appointment has been made by His Majesty the King upon the recommendation of the Prime Minister of the Commonwealth. Appointments to offices in the Commonwealth itself are made by the Governor-General upon the recommendation of a minister, and those appointments are the sole responsibility of the government, the Governor-General being bound to follow the recommendations of the minister. The Governor-General exercises no discretion in such matters. According to the formal announcement of the government, the appointment of the Governor-General has now been made in a similar way. If, as stated, the King acted upon the recommendation of the Prime Minister, His Majesty did not exercise any discretion in the matter. The new Governor-General is the nominee of the Scullin government, and not of His Majesty the King. The appointment, therefore, marks a distinct and most important change in procedure. Section 2 of the Commonwealth constitution provides that the Governor-General appointed by the King shall be His Majesty's representative in the Commonwealth. There is no reference to any advice being given to His Majesty the King by the Federal Executive Council, which is the executive agent of the Commonwealth. It really is the cabinet acting officially. Section 62 of the constitution specifies and delimits the functions of the Federal Executive Council in the following words, 'There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth.' Those words are evidently intended to describe and delimit the functions of the Federal Executive Council. They do not include any function of advising

[16] A. B. Keith: Responsible Government in the Dominions (Oxford University Press 1928). Preface at p. xiii.

[17] Sir William Irvine, Chief Justice of Victoria, Argus, 26 May 1930; Sir Edward Mitchell K.C., Argus, 10, 12 January 1931; Sir John Latham, Parl. Debs (H.R.) Vol. 127, at pp. 1073-4.

His Majesty the King. There is accordingly no warrant in the constitution for the practice that has been adopted in this case.[18]

Having regard to the resolutions of the Imperial Conference of 1926, this appeared to mean that nobody could constitutionally tender advice to the King on the appointment of a Governor-General; not the British government because of what was implicit in the 1926 rules, not the Australian government because no power to do so was conferred by the constitution. This was the view to which the United Kingdom law officers unhappily came.[19] Latham surprisingly did not reach this conclusion; his view was that it was still appropriate for the United Kingdom government to tender formal advice after determining that a prospective appointee was acceptable to the King and to the Commonwealth government.

There was a further argument specifically affecting the appointment of a judge as Governor-General. Section 8 of the Judiciary Act provided that:

a Justice of the High Court shall not be capable of accepting or holding any other office or any other place of profit within the Commonwealth, except any such judicial office as may be conferred upon him by or under any law of the Commonwealth.

Some lawyers argued that this disqualified Isaacs, who was then Chief Justice of the High Court. There was a difference of legal opinion on this question; some said that this provision only disqualified a judge from holding another office while he continued to hold a judicial appointment, but did not disqualify a High Court judge who resigned his judicial office and subsequently accepted appointment as Governor-General. Latham said in the House that:

It is a general principle that judges should have nothing to hope for and nothing to fear from any government. It is a matter for regret that, in this instance, that principle has been infringed by making a promotion from the Judicial Bench. It is of benefit to the Bench. It is obvious that if the practice now adopted is continued, Justices of the High Court can look for further advancement from the government of the day. Their position as interpreters of the constitution is such that this procedure may create an atmosphere of suspicion when decisions are given; particularly if those decisions are in favour of the government.[20]

18 Parl. Debs (H.R.) Vol. 127, at pp. 1073-4.
19 Nicolson, op. cit., at p. 479.
20 Parl. Debs (H.R.) Vol. 127, at p. 1075.

Latham put this as a matter of principle, and not as a matter of law to be spelled out of the Judiciary Act. As it happened, in Latham's own case, the Judiciary Act was later amended in 1940 to allow him to accept the office of minister to Japan while still holding the office of Chief Justice of the High Court. But the *principle* which he stated in debating the 1930 appointment does not appear to be more soundly based than the legal argument. The independence of the judicial office is a matter of prime importance, but the arguments advanced by Latham in this context for disqualifying a man once appointed to judicial office from holding other public office carry little conviction.

There is an interesting background to section 8 of the Judiciary Act. In the draft constitution bill adopted in Adelaide and Sydney in 1897-8 there was a *clause* which provided: 'No person holding any judicial office shall be appointed to or hold the office of Governor-General, Lieutenant Governor, Chief Executive Officer or Administrator of the Government or any other executive office.' Mr Higgins (later Mr Justice Higgins) vigorously opposed the clause in the final Melbourne session of the convention arguing that 'it is not expedient for us to dictate as to who shall be the agent of the sovereign',[21] and it was deleted. When the draft Judiciary Bill was later debated in Committee of the House of Representatives in 1903, Isaacs moved an amendment to what became section 8 arguing that it should be made clear that a judge of the High Court should not be allowed to accept the post of Acting Governor of a *State*. It was then asked whether it was appropriate that the Chief Justice of the High Court might be appointed Acting Governor-General of the Commonwealth. Isaacs said that he did not wish to exclude that possibility, though other members, including Deakin, who was then Attorney-General, disagreed. In the event, section 8 of the Judiciary Act became law in its present textual form and was introduced into the debate when the appointment of Isaacs as Governor-General was discussed in 1930.

The question of *advice* on the appointment of a Governor-General was considered by the Imperial Conference of 1930. Mr Scullin had gone to England to attend that conference and it was by then well known that there were differences between the Australian government and the King over the appointment of Isaacs. The conference resolved that in making an appointment of a Governor-

[21] Parl. Debs (H.R.) Vol. 14, at p. 1567 where he repeated the argument.

General, the King 'should act on the advice of His Majesty's ministers in the Dominion concerned'. It was also resolved that a formal submission should be made by Dominion ministers *after* informal consultation with the King to allow him the opportunity of expressing his views on any particular nomination. The decision was wise: having regard to the developments in Commonwealth relations it is inappropriate that United Kingdom ministers should be concerned in the appointment of a Governor-General, and while the Governor-General is the King's personal representative, it is surely inappropriate that the monarch should act otherwise than upon advice in the making of an appointment. He should obviously be consulted before formal advice is tendered to him for the appointment of his personal representative, but the tender of names and formal advice should be the responsibility of the ministers of the Commonwealth country concerned.

It appears that Scullin had advised Ramsay MacDonald of the intention to nominate Isaacs. The reports of the opposition in Australia to the appointment reached the British government and Scullin was asked to defer further action pending his arrival in England to attend the Imperial Conference. Scullin was not deflected from his purpose, but agreed to the delay, and when he arrived in England in October 1930, Ramsay MacDonald urged him not to press the matter. MacDonald feared that a conflict between the King and Scullin would have very unhappy consequences. At the end of October, Scullin had an interview with Lord Stamfordham who said that the objection was not to an Australian as such, but was based

> upon the principle that any local man, whether in politics or not, must have local political predilections, political friends and political opponents—whereas a nominee from England has no local politics and would therefore, as the King's representative, stand aloof from all politics as much as the Sovereign does at home.[22]

He also expressed the fear that the office of Governor-General would henceforth become part of the spoils of the party in office.

Shortly after this meeting, the Imperial Conference formulated the resolution that the Governor-General should be appointed upon the advice of the Dominion government concerned. On 29 November, Mr Scullin was received in audience by the King who stated his objections to the appointment. He said that the Australian

[22] Cited Harold Nicolson: King George the Fifth, at p. 479.

government's action was a departure from earlier practice. Lord Stamfordham noted that the King added:

> that Sir Isaac Isaacs, who would be more than ever His Majesty's representative, was personally unknown to him; that he was seventy-five years of age and that no Australian could be selected without having some party bias, local or social, from which a Governor-General coming from some other part of the Empire would be free.[23]

The King raised questions about the method by which advice would in future be tendered to the King in London by the Australian Prime Minister, and he asked whether this case might provide a precedent under which successive Commonwealth governments might wish for the appointment of new Governors-General. Lord Stamfordham recorded that the King finally acceded to Scullin's request because he did not wish to lay himself open to any political manoeuvre.

> His Majesty is well aware how easy it is to light and fan the flame of agitation by an ill-disposed minority—especially when, as in this case, constituted of Trade Unions, Communists and Irish, not of the highest class. And, as the King himself told Mr Scullin, he would not give him the opportunity of executing any such manoeuvre.[24]

Nearly forty years on, these words read strangely.

The King wrote in his diary that 'with great reluctance I had to approve of the appointment. I should think it would be very unpopular in Australia.'[25] There were additional steps to be taken, including a formal announcement of the appointment. Garran reports that after his audience with the King

> Scullin at once wrote to Lord Stamfordham, formally recommending the appointment of Isaacs. Lord Stamfordham asked me to see him, showed me the proposed notice of the appointment, and asked me to show it to Scullin. It ran, 'The King, on the recommendation of the Rt Hon. J. H. Scullin, Prime Minister of Australia, has appointed . . .' This was a public announcement of the King's displeasure, and it was to be shown to Scullin to make sure that he would not miss its significance.[26]

[23] ibid, at p. 480.

[24] ibid, at p. 482.

[25] ibid, at p. 480.

[26] Prosper the Commonwealth, at p. 323.

It is not surprising that Isaacs followed these uncomfortable events with lively interest. Among his papers was a document dated 1 July 1931, which was a statement in his own handwriting of what Scullin had told him had transpired in England. The document merits quotation in full:

> Mr Scullin after discussing other matters told me of his interviews in England respecting the Governor-Generalship.
>
> He said that on reaching England the impression existed in official circles that by agreeing to come and discuss the matter he had weakened on the matter. Nothing, he said, was further from the fact. He had not weakened, but having had an invitation to discuss the question with the King, it was a command that must be obeyed.
>
> First he had a conversation with MacDonald and Thomas. They asked him why he desired a departure from previous precedent. He said 'What departure?' They said, previous practice. He said 'There is no departure. Previous precedent was appointment on the advice of Ministers. Since 1926, the appropriate ministers are the Dominion Ministers. So there is no "departure" really.' They said 'Why insist on your Australian recommendation?' He: 'Is not an Australian eligible?' They: 'Oh certainly.' He: 'Well then have you any objection to Sir Isaac Isaacs as an individual?' They: 'None whatever.' He: 'Then why object at all?' They: 'Well we have always found that whenever a difficulty crops up, it is well to see Lord Stamfordham the King's Secretary.'
>
> Scullin then arranged to meet Stamfordham. Stamfordham said 'Do you insist on your recommendation?' 'Yes,' said Scullin, 'why not?' Stamfordham: 'Why do you hold a pistol to the King's head?' Scullin: 'I don't hold any pistol to the King's head. I have here an invitation to state the type of man we desire for Governor-General. I answer by not only stating the type but giving you the name of the very man.' Stamfordham: 'But he is a local man.' Scullin: 'Do you mean that no Australian is eligible?' Stamfordham: 'No! No! You've got me wrong.' Scullin: 'Well if not, what is wrong with Sir Isaac Isaacs?' Stamfordham: 'He was in politics.'
>
> Scullin: 'He has been out of politics for nearly a quarter of a century. He has been on the High Court Bench for that time, and had to be impartial. He is a man of culture and a clean life.'
>
> Stamfordham: 'But the King does not know him so well as he knows others.'
>
> Scullin: 'If I am to be the King's adviser in this, how am I to advise him about men at this end that I know nothing about?'
>
> Stamfordham: 'But you give the King no choice. If you select only one.'

Scullin: 'Well we have chosen the man we regard as the best. He never was a member of our party, he is free from politics and has proved his worth and is trusted by Australia.'

Stamfordham: 'Are you sure he will be acceptable to all Australia? Because we have some petitions.'

Scullin: 'I am His Majesty's adviser and know.'

Stamfordham: 'Would you be prepared to take a referendum?'

Scullin: 'Yes. I am prepared to take a referendum both as to the method of appointment and I am willing to include the name.'

That staggered Stamfordham and he said no more.

Then Scullin went straight down to Ramsay MacDonald and said—'I have seen Stamfordham and he suggests a referendum. I have accepted. And he tells me that petitions from private people are being acted on by way of advice. I shall make arrangements for the referendum and when I get back I shall state my views to the Australian Parliament as to whether any persons but the King's Ministers have the right to tender His Majesty advice on such a matter.'

They: 'Oh no! Don't do that. That will never do.'

He: 'Well that's what I was asked to do.'

They: 'Don't! Better see the King.'

Then he saw the King, who put the questions about departure and received the same reply.

The King: 'Have not the former Governors-General always been acceptable?' Scullin: 'Yes—but now we have to advise your Majesty as to the next one. Has your Majesty any objection personally to Sir Isaac Isaacs?' The King: 'No certainly not. All the reports of him that I have had are good. But I don't know him so well as others, though I have twice decorated him.'

Scullin: 'We have full confidence in him. But I say to your Majesty as a P.C. that if your Majesty says there is any personal objection to him I would waive it.'

The King: 'None at all. But he is a local man and has been in politics.'

[I may mention what I forgot when I referred to Lord Stamfordham. Scullin referred to Ireland, and Healy and McNeill. 'Oh,' said Stamfordham, 'Don't mention South Ireland. They were rebels.' But after seeing Stamfordham Scullin learnt that the Governor-General of N. Ireland the Duke of Abercorn was a local man, a Belfast man, and had been very much immersed in politics. So when he saw the King he used this knowledge.]

Scullin (to the King): 'Your Majesty, the Duke of Abercorn is also a local man and has been in politics.'

The King: 'Well do you persist?'

Scullin: 'Yes.'

The King: 'Well, I've always been a constitutional monarch, and will follow your advice.'

So it was done.

Then comes the most astonishing thing of all. You remember that the Notification was posted on Australia House: 'The King, on the recommendation of Mr Scullin P.M. of Australia has appointed etc.' Scullin told me that he did not frame it that way. He had sent Garran to the Dominions Office to get the usual form and so framed it. But the alteration was made at Buckingham Palace and followed accordingly.

I should think it was meant that the King didn't want to say he 'approved' it.

Scullin himself made a note of these events which was among the file of personal papers which he gave to Mr J. B. Chifley when the latter was moving as Prime Minister for the appointment of Mr William McKell as Governor-General. Scullin recounts that a letter was sent by the Dominions office through Lord Stonehaven asking him as Prime Minister 'to indicate the class of candidate we would desire to fill the position' of Governor-General:

> In answer to it I recommended the appointment of Sir Isaac Isaacs. It was very early made apparent that strong exception was taken to the proposal to appoint an Australian to the position.

While this document traverses much of the ground covered by Scullin's account as noted by Isaacs, it amplifies and adds to that account. In referring to his interview with Lord Stamfordham and then with the King, Scullin wrote:

> He (Lord Stamfordham) then said: 'Would you be prepared to take a referendum on the subject?' I promptly answered: 'Yes, and would, if necessary, be prepared to fight an election on the issue whether an Australian is to be barred from the office of Governor-General because he is an Australian.' Thereupon Lord Stamfordham said: 'But I tell you again we do not object to Sir Isaac Isaacs on the ground that he is an Australian.' Then I asked: 'What is your objection to him? Are there any personal reasons?' He said: 'We have nothing against Sir Isaac Isaacs personally, but the King's representative must be entirely free from politics.' 'Then,' I said, 'that makes my position very easy because Sir Isaac Isaacs has been dis-associated from politics for a quarter of a century. He has been a Justice of the High Court and is, at the present moment, Chief Justice. He has lived all those years in the judicial atmosphere,

entirely removed from politics, and even when he was in politics, he did not belong to the party which I lead in Parliament today.' Lord Stamfordham replied that all men are politicians. 'Well, then,' I answered, 'none is fit to be a Governor-General according to that dictum.' 'Oh, no,' he said, 'it is only local politics which matters.' 'Then,' I said, 'it comes back to the original protest: your objection is because our recommendation is a local man, an Australian.' I concluded the interview by asking him if he were speaking for the King when he threw out the challenge to have a referendum. I said: 'I hardly believe it would be the wish of the King that the appointment of his personal representative in Australia should be the subject of public propaganda and public controversy. But if that were his desire and, further, if he were to be influenced by propaganda in the shape of petitions from correspondents, then we would be forced to meet propaganda with propaganda and, for the first time, this appointment would become a matter of public controversy.' Up till then I had absolutely guarded the position from such methods; in fact I had refused members of the Opposition an opportunity to discuss it in Parliament. Before I got to London Mr Gullett had asked questions for the purpose of getting information. I had refrained from answering any statements in the press but had gone along quietly until the matter was successfully accomplished.

About a week later I left London for a tour through Scotland, the northern part of England and across to Ireland. When in Ireland I was informed that the King desired to see me before I left London. That necessitated my cutting my visit to Ireland short by two days and I returned to London on a Saturday. The King said he wished to see me in regard to the appointment of a Governor-General. 'Perhaps,' he said, 'before you say anything I might express my views.' I said I would be very glad to listen. He said: 'It is now 30 years since I opened the Commonwealth Parliament in Australia. Since then we have sent many Governors, Commonwealth and State, and I hope they have not all been failures.' He asked if that were so? I assured him, of course, that they had not all been failures. Then, why my desire to make a change in the usual procedure, he asked. Because, I said, we were asked to indicate the class of candidate we would like and we nominated one whom we knew was an Australian, who understood the Australian people, and the nomination, judged by standards of integrity and culture, training and public service, excelled any of the Governors-General who had ever been sent to Australia. The King traversed much of the ground which had been covered by Lord Stamfordham but he hastened to assure me that the last thing he desired was a referendum or public controversy. He also said that they had the highest regard, personally,

for Sir Isaac Isaacs. After about 45 minutes discussion the King said: 'I have been for 20 years a monarch and I hope I have always been a constitutional one, and being a constitutional monarch I must, Mr Scullin, accept your advice which, I take it, you will tender me formally by letter.' I then withdrew.[27]

There is good reason to believe that the name of Sir William (later Lord) Birdwood was put forward by the Palace as a counter proposal to the recommendation of Isaacs. Birdwood, who was then completing his tour of duty as Commander-in-Chief, India, had had close association with Australian troops in the first world war and it was hoped that this might make him acceptable to the Australian government.[28] But Scullin stood firm on the nomination of Isaacs.

Throughout the months of the controversy, the appointment was freely discussed in the Australian press. The Melbourne *Argus* had vehemently opposed the nomination and had angrily criticized the Scullin government, whose action was assailed as

> a preposterous and impudent attempt to alter a system which has lasted since the institution of responsible government in Australia. The Ministry is behaving with the arrogance of an army of occupation in a conquered country. . . . [It was a blow to the mother country] inspired in the last analysis by men who hate Britain and the Imperial connection, and would do all in their power to injure one and destroy the other. These men, or their parents, have brought old world grievances with them to Australia, and they have nourished them so assiduously that all their thoughts and actions have become warped thereby.[29]

There was no personal attack on Isaacs who was said to have had a long and honourable career and to have been a distinguished jurist. What was reckoned against him was his long political career and his 'political prepossessions [which] have but deepened with the years'.[30] When the public announcement of the appointment was made in early December, the *Argus* wrote graciously about Isaacs' personal attributes.[31]

The *Sydney Morning Herald* was apprehensive of the damage to the Empire link and of the possible bias of an Australian appointee,

[27] Crisp: 'The Appointment of Sir Isaac Isaacs as Governor-General of Australia 1930: J. H. Scullin's Account of the Buckingham Palace Interviews' (1964) 11 Historical Studies Australia and New Zealand, at pp. 256-7.

[28] ibid, at p. 253.

[29] 25 April 1930, at p. 6.

[30] Argus, 3 May 1930, at p. 24.

[31] 4 December 1930, at p. 6.

but wrote in personal praise of Isaacs.[32] The Melbourne *Age* throughout took a different line. It saw no objection to the appointment of an Australian, and certainly none to Isaacs who was 'pre-eminently worthy' of an appointment which was 'a thoroughly befitting climax to a notable career'.[33] It said that a vital principle had been established that Australians were now eligible for the office and that this was consistent with the decision of the 1926 Imperial Conference. The *Age* added, with a just appreciation of the events, that some of the antagonism to Isaacs 'had its basis in pure snobbishness . . . Australians never dreamt of asking the King to make the office of Governor-General a close preserve for native-born people'.[34]

This controversy was renewed when, at the end of 1946, it was rumoured that the federal government proposed to recommend the appointment of Mr William McKell, then Labour Premier of New South Wales, as Governor-General. The rumours were confirmed and the appointment was announced early in 1947. This time the issue was complicated by the fact that Mr McKell was actively engaged in State politics at the date of his appointment. Isaacs, then approaching the end of his long life, was reported to have said in response to a question about the appointment: 'It is only what I expected—that the King would act constitutionally in accepting the advice of the ministers of this Commonwealth.'[35] Once again, as in the earlier case, there was a public and a press controversy; once again, as time passed, it was acknowledged that the appointee had discharged his duties ably and with dignity. In November 1951, in commenting on the award of a knighthood to Sir William McKell, the *Sydney Morning Herald*, which had vigorously criticized his appointment in 1947, spoke in warm praise of his performance as Governor-General. At the same time, it recalled the earlier criticisms and maintained its editorial view that the appointment of an Australian as Governor-General weakened the personal link with the Crown.[36]

The intensity of the controversy over the appointment of Isaacs and the intemperate and dogmatic positions taken up in opposition to it seem very strange at this point of time, in the mid 1960s. The

[32] Sydney Morning Herald, 24 April 1930, at p. 10; 4 December 1930, at p. 8.

[33] Age, 4 December 1930, at p. 6.

[34] ibid.

[35] Sydney Morning Herald, 3 February 1947, at p. 2.

[36] 12 November 1951, at p. 2.

appointment in 1965 of Lord Casey, an eminent Australian who had had a long career in politics, was received with general approval. In the years since 1930, and particularly since 1945, there have been notable changes in attitudes to many questions touching Commonwealth relations. During the angry controversy, Isaacs himself observed the storm with absorbed interest; among his papers are many newspaper clippings reporting the events. It could not have been a very comfortable time for him, and though the controversy was carried on for the most part in the context of the desirability of appointing an Australian, Isaacs would not have been slow to perceive that there were personal elements in it, some of them of the meanest and most prejudicial kind.

Garran says that there can be no doubt that the chief ground of the King's displeasure was that there had been no consultation with him before the Australian cabinet reached its decision and that:

> it seems clear that Scullin did, in accordance with what he understood as directions from his cabinet, to all intents fail in that informal prior consultation with the King which was the established protocol.[37]

This is certainly a valid criticism of the government's action, though no public announcement was made by the government until the appointment was formally announced. But it appears that a firm decision by the cabinet was made to recommend Isaacs in advance of any consultation with the King. The resolution of the Imperial Conference of 1930 called for informal consultation with the King before a formal recommendation was made by the appropriate Dominion government, to give the King an opportunity to express his views, desires and objections. But although Garran, who was in London at the time and was shown the proposed notice of the appointment by Lord Stamfordham before it was formally announced, was in a position to know a great deal about these events, it may be doubted whether he is correct in his statement of the chief ground of the King's opposition. Sir Harold Nicolson's judgment, on the basis of full access to the papers of the King and of Lord Stamfordham, is that the King was opposed to the appointment of an Australian and to the appointment of this particular Australian, and this is confirmed by Isaacs' own note of what Scullin had told him.

It may be added that Nicolson's account of these events not only

[37] Prosper the Commonwealth, at p. 323.

shows him to be out of sympathy with the position taken up by the Commonwealth government in opposition to the wishes of the King, but also discloses a curious hostility to Isaacs. He writes:

> The veteran Sir Isaac Isaacs was thus installed as Governor-General. Within a few weeks he was sending the King private letters of immense length, describing his own benevolent activities, and the party dissensions which rendered federal politics of such interest to an outside observer.
>
> When in 1935 Sir Isaac Isaacs, having reached the age of eighty, contemplated retirement, the problem of his successor arose. Mr Lyons, at that date Commonwealth Prime Minister, informed the King that he was 'most anxious that the next Governor-General should come from Great Britain and be of distinguished lineage'. Sir Alexander Hore-Ruthven, subsequently Lord Gowrie, was therefore appointed: he proved one of the most wise and popular Governors-General that Australia had ever known.[38]

There is little justification for the implications in this statement. Isaacs entered into his duties as Governor-General with great zest; whatever was in his inner mind he showed no traces of resentment at the King's opposition to his appointment, and in communicating with the King as his Australian representative, he wrote in the style and detail which was characteristic of him. With respect to the implication to be spelled out of Nicolson's reference to the subsequent Governor-General, it is unnecessary to say more than that when Isaacs retired from the high office which had come to him as a brilliantly gifted man of no distinguished lineage, it was generally acknowledged that he had served as Governor-General during harsh depression years with dignity and distinction.

Isaacs was Governor-General from 22 January 1931 until 23 January 1936, when his successor Lord Gowrie was sworn in. For the country, these were difficult depression years, 'lost years'.[39] As one historian has written:

> After the disillusionment caused by the pricking of the bubble of the twenties and the suffering of the depression, development virtually ceased. It was not only that immigration ceased, that the birth-rate fell so low that demographers forecast an early fall in the population, and that low prices of primary products discouraged the further opening up of the country—which was perhaps wise, as farmers had too often settled in unsuitable areas—but that few improvements were

[38] King George the Fifth, at p. 482.

[39] A. G. L. Shaw: The Story of Australia (Faber 1962) at p. 244.

made where they would have been profitable or were socially very desirable. City transport, slum clearance, education, public health, social services of all kinds came practically to a standstill. Hospitals and schools were not built. The universities were starved. The attempt of the Commonwealth government to introduce a comprehensive scheme of national insurance was abandoned.[40]

This describes the events of a period which continued throughout the decade and extended beyond Isaacs' term of office. Between the financial years 1928-9 and 1929-30, the national income declined from £640 million to £560 million; between 1928 and 1933 the price of wool and wheat halved; and in 1933 nearly one-third of the working population was unemployed. For the Scullin government and for the State governments this presented appalling problems, and they struggled to find solutions to them. British experts advised retrenchment and the Premiers' Plan contemplated far-reaching financial cuts. The Scullin government split three ways. J. A. Lyons in effect took himself out of the Labour party by supporting an opposition motion of no confidence in March 1931, and he joined Latham, the Leader of the Opposition, in attacking the government's financial policies. Shortly thereafter, the United Australia Party was formed under the leadership of Lyons by merging the Nationalists under Latham with the Labour dissidents who followed Lyons. There was also a left wing dissident group, which in the federal sphere supported the views of J. T. Lang, Premier of New South Wales. Finally, the Scullin government was defeated and fell in November 1931 when the Lang Labour group voted with the United Australia Party. At that time, Isaacs as Governor-General acceded to Scullin's request for a dissolution of the House and at the ensuing general election the United Australia Party was returned with a decisive majority.

It fell to Isaacs as Governor-General to swear in the new Lyons government in January 1932, and in February he opened the new parliament. The press noted that the ceremonies were more austere than on earlier occasions and that a motor car was substituted for the vice-regal coach and four. The Governor-General, apart from his speech, made one further contribution to the proceedings. The newly installed Speaker of the House, Mr Mackay, was loaned Isaacs' full-bottomed wig, and the loan was subsequently converted into a permanent gift. The Governor-General's speech, announcing

[40] ibid.

governmental policies, dwelt on economic difficulties, on action to be taken against communism and subversion, and particularly on action to deal with the threat from the New South Wales government under J. T. Lang. The federal quarrel with Lang began in Scullin's time, and it moved to its crisis point after Lyons became Prime Minister. Lang had become Premier of New South Wales for a second time in 1930, and he demanded a reduction in the interest burden to the overseas bondholders whom he violently attacked. He talked of 'class enemies', and there were banners and slogans announcing that 'Lang is right' and 'Lang is greater than Lenin' at huge Sydney public meetings. Lang's threats of default provoked great alarm and angry opposition; as Latham, then Deputy Prime Minister, said in a speech in London in April 1932 when the dispute was not yet finally resolved:

> Mr Lang . . . has asked the people whether they believe in supporting the babies of New South Wales or the bondholders. I am not going to enter into that matter here except to say that in our view in the long run the babies will suffer if a government does not perform its obligations.[41]

Latham supported Scullin in opposition to Lang's declared intention to default on interest payments due in London in April 1931. On this occasion, Lang finally agreed to meet his commitments, but the new Lyons government was faced with the problem when Lang once again defaulted. The Governor-General's speech foreshadowed federal action to deal with Lang's further default. This was the Financial Agreements Enforcement Act which furnished legal machinery for the enforcement of New South Wales obligations to the overseas bondholders. In effect this legislation garnisheed New South Wales revenues and made them payable to the Commonwealth until New South Wales' obligations were honoured. Lang unsuccessfully challenged the constitutionality of this legislation in the High Court.[42] The Commonwealth government made clear its determination to win the battle with Lang; as Latham said, 'However many rounds the contest lasted the Federal government would fight to the end against Langism which was nothing short of Sovietization.'[43] Move and counter-move followed; and in May 1932

[41] Speech to a Study Committee of the Empire Parliamentary Association, 21 April 1932.

[42] *New South Wales v. The Commonwealth* (1932) 46 C.L.R. 155.

[43] Argus (Melbourne), 11 April 1932, at p. 7.

Sir Philip Game, the Governor of New South Wales, dismissed Lang on the ground that he and his ministers had committed a breach of the law. In the subsequent election in New South Wales, the Stevens ministry which the Governor had commissioned was returned, and the Commonwealth victory was complete.[44]

Isaacs as Governor-General played no part in the struggle with Lang beyond taking the formal steps in respect of the Commonwealth legislation which the Governor-General was required to take. The action taken by Sir Philip Game was certainly a remarkable and a controversial exercise of royal prerogative power, but it was taken without reference to Isaacs who by reason of his place in the federal structure of Australian government had no involvement in it.

Not long before the dismissal of Lang, Isaacs in company with Sir Philip Game and other State Governors attended the ceremonies to mark the opening of the Sydney Harbour Bridge in March 1932. It was not a comfortable occasion for the federal representatives, the Governor-General and the Prime Minister, who were pushed very much into the background. Reference was made in the press to the

> unceremonious—almost discourteous—treatment of the Governor-General and the Prime Minister at the bridge opening ceremony. The Commonwealth representatives were pushed into the background and particular care seemed to have been taken throughout to eliminate the federal note.[45]

Neither the Governor-General nor the Prime Minister was invited to speak.

The Governor-General's ceremonial guard of honour of lighthorsemen provided an opportunity for one Captain Francis Edward de Groot to create for himself a minor niche in Australian history. The times were disturbed, and among the organizations which grew up in New South Wales in angry opposition to Lang was the New Guard which as Shaw says 'in the hey day of shirts of varying hues in Europe was somewhat disturbing to the more normal political life of Sydney'.[46] It had been hinted by the New Guard leader that a move might be made to deny to Mr Lang the pleasure of cutting the pale blue ribbon, the severance of which was to signal the

[44] For an account of these events see Evatt: The King and His Dominion Governors (Oxford University Press 1936) Ch. XIX.

[45] Advertiser (Adelaide), 26 March 1932.

[46] The Story of Australia, at p. 243.

opening of the bridge. So this delicate piece of cloth was well protected by the forces of law and order. Captain de Groot, who, it was said, acted with the full approval of the New Guard, rode in uniform just behind the Governor-General's ceremonial guard. Then he rode up to the ribbon which he finally severed after several ineffective slashes with his sword, proclaiming, 'I declare this bridge open in the name of His Majesty the King and the decent people of New South Wales.' He was dragged from his horse, taken to the adjacent toll house, and subsequently made his appearance in court. In the meantime hasty repairs were made to the ribbon, and Mr Lang went officially to work on it.

Isaacs discharged the ceremonial duties of his office with obvious enjoyment and the books of newspaper clippings of the period which he preserved record a multitude of activities associated with the vice-regal role. From the cuttings, with their accounts of dinners, balls, agricultural shows and vice-regal visitations it sometimes seems hard to recall that these were bitter and difficult years. But Isaacs was fully conscious of the difficulties of the time. He took the initiative in proposing a voluntary cut in the Governor-General's salary, which under the constitution could not be altered during his continuance in office. He was keenly interested in the development of Canberra, and particularly in the early growth of Canberra University College which later was incorporated into the Australian National University.

He travelled widely throughout Australia and appears to have enjoyed it greatly, despite the discomfort and strain which it must have imposed on a man who was over eighty when he relinquished office. In May 1934, in a letter from Sydney to his daughter Marjorie, he gave an account of travels and activities which he took in his stride:

> We have had a busy time since I wrote. We left Canberra at 9.38 a.m. Wednesday, arrived Goulburn at 12.28. Received the Church Representatives in the train, went immediately after lunch in train in car to see Ch. of Eng. Children's Home, then to Community House, then to other sights—then 'Home' to Railway Car. Then dined in car, dressed for Ball (Jubilee) and stayed till 11. Back to Car and at 6.18 a.m. the Car jerked off for Sydney, arriving at 10.10 a.m.
>
> Then received Officers [*sic*] held Executive Co. did official correspondence and dined at Clubs and off to St. Vincent's Ball. Home at 12. Yesterday Investiture.

He maintained friendly relations with State Governors, and the Governor-General's visitors' book contained many signatures of official visitors and friends who came to Yarralumla. Among them is the signature of the Duke of Gloucester who came to Australia in 1934 to take part in the celebrations which commemorated the centenary of the City of Melbourne. The announcement of the Duke's visit for this purpose produced an awful pun. Isaacs wrote to his daughter: 'You have seen that Prince Henry takes P. George's place. Up to now we have been saying cen-tee-nary. Mother says that now perhaps people will say "sent-'enery".' Somewhat earlier, in March 1933, in the visitors' book there is a chill remembrance of the bitter sporting controversy of that time, when Douglas R. Jardine, the captain of the English cricket team, visited Yarralumla with a small group of his team-mates. In 1935 Isaacs as Governor-General took a prominent part in the ceremonies associated with the celebration of the twenty-fifth anniversary of King George V and a letter of that time records with zest and pleasurable anticipation the formidable programme of engagements undertaken by this extraordinarily energetic octogenarian.

To his constitutional duties he brought not only great application and assiduity but also a unique learning and knowledge. In special cases, he furnished elaborate memoranda expounding the reasons for his action. Of these, the most notable was his answer to the address of the Senate in 1931 praying that the Governor-General should refuse to approve certain regulations. Under the Transport Workers Act power was given to the Governor-General (in substance the Executive government) to make regulations with respect to the employment of waterside workers engaged in interstate trade. Subsequently the Senate, acting under the Acts Interpretation Act, disallowed regulations made in accordance with the Act by the Governor-General. The political situation was that the Scullin government had a majority in the House of Representatives but was in a minority in the Senate. The Senate when it met would disallow regulations which would thereupon cease to have effect under section 10 of the Acts Interpretation Act. Then, after the Senate adjourned, the cabinet formally advised the Governor-General to issue a fresh regulation under the Transport Workers Act. This remained in force for a few days until the Senate met and disallowed it. Thereafter the process was repeated. This activity was described by Starke J. as 'entirely subversive of the control of

parliament over regulations'.[47] The Senate asked the Governor-General to refuse to approve during the existing session of parliament any regulations 'being the same in substance as regulations which the Senate, in the lawful exercise of its powers' under the Acts Interpretation Act 'has, in this session, already disallowed'. It was said to be a rule of each House that no question should be presented which was substantially the same as one on which an opinion had already been expressed during the current session, and that the principle should apply equally to regulations passing through each House of the parliament. The action taken by the Executive was said in the Senate's request to be 'inconsistent with the spirit and intention of the constitution'.[48]

Isaacs, in his reply dated 6 June 1931, declined to comply. He set out his reasons at length:

> I do not understand from anything contained in the address that you question the legality of any regulation of the nature you have mentioned. At the same time I wish to assure you that I have, to the best of my ability, carefully re-examined the matter from this standpoint also, in order that no plain illegality should arise. My consideration of the relevant legislation and judicial decisions has led me to the belief that the advice of my legal adviser, the honourable the Attorney-General, is correct—that unless and until disallowed by either House of the parliament such a regulation would be valid and have the force of law.
>
> With respect to legality, therefore, it is obviously my duty to take the only course which would enable the proper tribunal for that purpose, the judiciary, to determine the question should it arise.
>
> As to the constitutional propriety of my approval to such a regulation as is postulated by the address, it cannot be doubted that normally by constitutional practice, confirmed, and perhaps strengthened, by the pronouncement of the Imperial Conference of 1926, I am bound to act upon the advice of my ministers.
>
> My departure from that established principle in the present instance is urged upon me on two grounds. One is the difference between the respective constitutional powers of the legislature and the executive. The other is the rule of practice observed by the two legislative chambers as described and illustrated, together with instances of departure from the rule, in May's *Parliamentary Practice*, 13th Edition, at pages 292 to 302.

[47] *Dignan v. Australian Steamships Pty Ltd* (1931) 45 C.L.R. 188, at p. 202.
[48] Parl. Debs (Senate) Vol. 129, at p. 2343.

As to the first ground, there is not, as I regard the position, a contest between the legislature on the one hand and the executive on the other. If such were the case it could obviously be speedily ended by ordinary constitutional methods.

But with regard to the political desirability of certain regulations, there has arisen a serious difference of opinion between one branch of the legislature, namely, the House of Representatives, tacitly and constantly supporting the regulations as framed by the Executive, and the other branch of the legislature, namely, the Senate, expressly and constantly disapproving of these regulations.

My plain duty in such circumstances, as it appears to me, acting, not as the representative of His Majesty the King as a constituent part of the Commonwealth parliament, but as the designated executant of a statutory power created and conferred by the whole parliament, is simply to adhere to the normal principle of responsible government by following the advice of the ministers who are constitutionally assigned to me for the time being as my advisers, and who must take the responsibility of that advice. If, as you request me to do, I should reject their advice, supported as it is by the considered opinion of the House of Representatives, and should act upon the equally considered contrary opinion of the Senate, my conduct would, I fear, even on ordinary constitutional grounds, amount to an open personal preference of one House against the other—in other words—an act of partisanship.

The other ground of your request, namely, the practice of parliament during the session as to re-consideration of proposals already dealt with, does not appear to me to be inherently applicable to executive action in making regulations under statutory authority.[49]

In this statement, Isaacs made it clear that he personally had given very careful consideration to the legal issues. He was well-equipped to do so, but as Dr Evatt points out, it should not be assumed that every representative of the monarch whether proficient in legal learning or not is entitled to determine for himself any legal issue which may be raised. It was therefore sound constitutional practice for a Governor-General to assent to the action proposed by his ministers, leaving questions of legality to be determined by the courts.[50]

Isaacs also furnished a memorandum covering his grant of a dissolution of the House of Representatives at the request of

[49] Parl. Debs (Senate) Vol. 130, at pp. 1595-6.

[50] Evatt: The King and His Dominion Governors, at p. 187 and see *Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan* (1931) 46 C.L.R. 73 at pp. 129-30.

Scullin in November 1931. The Lang Labour group in the House of Representatives led by J. A. Beasley moved an adjournment of the House to discuss a matter in dispute between his group and the government. When the motion for the adjournment was carried by five votes, Scullin, who had given warning of his intention if the adjournment motion was carried, informed the Governor-General that that motion had been carried by a combination of the opposition parties and the Beasley group. Isaacs wrote:

> I have to say that, in view of the present constitutional position of the Governors-General of a dominion, as determined by the Imperial Conference of 1926, confirmed by that of 1930, I am of opinion after careful consideration, that it is my duty in existing circumstances to accept the advice tendered by you and accordingly to grant the dissolution asked for. I note that parliamentary provision has already been made for carrying on the necessary public services.

He cited various works of Keith to support the proposition that while there could be circumstances in which the monarch (or his representative) might decline to accept his ministers' advice to grant a dissolution, they should be viewed as extreme and highly exceptional cases. Isaacs' memorandum continued:

> Even apart from the practice recognized by the Imperial Conference of 1926, there are considerations in the known circumstances which tend to support the acceptance of the advice tendered to me. They are such as the strength and relation of various parties in the House of Representatives and the probability in any case of an early election being necessary.[51]

The reference in this last paragraph was to the fact that the House of Representatives had run two years of its three-year course, that an election for half the Senate had to be held early in 1932 and that it was a saving of public money to hold the House and Senate elections together. Evatt suggests in this case that the position of the Governor-General may not have been as clear as Isaacs stated it to be, though it cannot be said that his action in granting a dissolution to Scullin was unwarranted.[52] Evatt, whose book *The King and His Dominion Governors* is the chief source of authority on these questions, points out that the difficulties arise out of the uncertain state of the law.[53] In 1935 Isaacs granted a dissolution to

[51] Parl. Debs (H.R.) Vol. 132, at pp. 1926-7.

[52] Evatt, op. cit., at p. 237. [53] ibid.

Lyons, not long before the three-year term of the House was due to expire, but this was not a controversial case.

Isaacs left Canberra as Governor-General for the last time early in January 1936. From time to time there were echoes of the controversy over his appointment. There was, for example, an unhappy incident when a Queensland Supreme Court judge made widely publicized remarks about the non-attendance of four federal ministers in the newly formed Lyons government at a vice-regal dinner in February 1932. It was said that this was a discourtesy to the Governor-General and reflected the unwillingness of the ministers to accept the procedure by which Isaacs was appointed. But such incidents were rare and at the time of his retirement there was much said in praise of him by national leaders and by the press. Early in his term of office, in April 1932, he was created G.C.M.G.

A few days before he retired, King George V died and among Isaacs' last official duties was the transmission of messages of condolence and of loyalty to the new King, Edward VIII. King Edward sent a cable to Isaacs which read:

> My father, had he been spared, intended to send you a message thanking you for your valuable service as his personal representative in Australia. I am therefore doing this in his name and add the hope that you and Lady Isaacs may enjoy many years of happiness and leisure.

At a ceremony in the Legislative Council Chamber in Melbourne on 23 January, Isaacs formally took his leave of the Prime Minister and his ministers, and Lyons spoke appropriately of Isaacs' long and notable public services. On that day Lord Gowrie was sworn in at Melbourne, and Isaacs paid a courtesy call upon the new Governor-General. In his eighty-first year, Isaacs retired into private life.

9

Retirement: The Zionist Controversy

AFTER A SHORT STAY at Marnanie at Macedon, Isaacs and Lady Isaacs sailed for England early in 1936. The journey had been arranged by the Commonwealth government to permit Isaacs to give a personal account of his stewardship to the King. Isaacs and his wife were the King's guests, and they also met Queen Mary, the Queen Mother. Isaacs, an ardent Empire and King's man, greatly enjoyed this visit. It had been fifteen years since he was last in England, though Lady Isaacs had been abroad in the intervening years, and Isaacs took the opportunity to renew personal associations with some of those he had met in 1921, and to make new acquaintances. Among these was Lord Wigram, who had succeeded Lord Stamfordham as private secretary to King George V in 1931. Shortly after his return to Australia the abdication crisis occurred and Isaacs was not surprisingly invited by the press to make some public statement about it. He despatched press cuttings to Wigram, who acknowledged his letter, expressing his dismay at the events of the abdication, and his high hopes for the new King. 'I showed the King your nice statement about him in the Melbourne *Herald*, and I could see that he was pleased that you had said what you did.' Isaacs was appointed a member of the committee which was responsible for the organization of the coronation celebrations in Australia, and in the Coronation Honours List in May 1937 the high honour of G.C.B. was conferred on him.

Isaacs and his wife returned to Melbourne late in November 1936. He did not go abroad again—he was now eighty-one—and for the remaining eleven years of his life he and his wife lived first in Walsh Street, South Yarra, then at two addresses in Lansell Road, Toorak, and finally in Marne Street, South Yarra. Marnanie remained the family holiday house until the 1940s, and he was still writing from Macedon in the early war years. During these years of retirement he remained for the most part very vigorous and active, reading in the Public Library at Melbourne, publishing

pamphlets and papers, writing to the press on a variety of matters, making speeches, and presiding at various functions. In April 1939 he presided at a large meeting at the Melbourne Town Hall to honour the eighty-fifth birthday and fiftieth parliamentary anniversary of the 'little doctor', Dr William Maloney, with whom he had sat in both the Victorian and the federal parliaments. He wrote to his daughter Marjorie: 'I enclose reports of the "Maloney" reception. Mother was there and it was one of the rare occasions when she *has* to listen to me. The little Doctor is a great philanthropist.' In the same month he attended the Requiem Mass for J. A. Lyons who died in office as Prime Minister. In the letter in which he wrote of the Maloney reception he also referred with satisfaction to the public reception of his pamphlet, *Australian Democracy and Our Constitutional System*, which had been published in the previous month and in which he dealt with various political and constitutional matters and argued, as he was to argue later, for major constitutional reforms.

His energy was prodigious. His speeches on a wide variety of themes were delivered from carefully prepared texts. A notable example was the Monash oration, delivered to the Victorian Jewish Graduates and Undergraduates' Association in 1937, in which he reviewed in characteristically florid and rhetorical style the life and achievements of Sir John Monash.[1] In his eighty-ninth year, in 1943-4, he poured out many thousands of words week by week in the *Hebrew Standard*, a New South Wales weekly Jewish paper, on the subject of political Zionism. At the same time he was writing on this subject in the Jewish press elsewhere in Australia. Even so, these vast outpourings did not wholly absorb his energies, for he was actively concerned at the same time with the cause of constitutional reform, a cause which was always in the forefront of his mind. On this, he wrote and broadcast. In November 1942 he wrote to Marjorie:

> I am broadcasting tomorrow (Friday) evening at 8.15 to 8.45 on Australian Nationhood and the Constitutional proposals. . . . I shall speak quickly as I have much to say and not much time to say it in. As I am immersed in it now, I don't stop for any of my usual chats.

And then some days later:

> It is very gratifying to hear that my broadcast found favour with so many who I thought might be opposed to my views. I have heard the

[1] The full text of that speech is printed in Gordon: Sir Isaac Isaacs, at pp. 179-88.

same as to people here. Evatt as you know spoke well of me. And now I am enclosing you [*sic*] what Curtin said to the Convention about me. It is from the *Argus* of today. Strange to say the *Age* leaves it out. Well it does not matter. Curtin's address was very much in line with my own ideas, which is not wonderful because we both take the view that Australians should have larger powers of self-government.

A great deal of energy also went into the writing of scholarly articles, particularly on biblical and religious subjects. In the last year of his life, in his family correspondence, there are references to papers written and to be written. In May 1947, not long before his ninety-second birthday, he wrote of his intention to prepare for a Jewish journal published in Western Australia some articles on Jewish ethics prior to the Christian era. He was as good as his word, and early in July he wrote that an article had been duly despatched and accepted and he was obviously much pleased that it had been commended. There were many other writings: on the book of Job, on the Fatherhood of God, on a variety of subjects, religious and non-religious. Only four months before his death he was writing at length to the *Age* on a new application of an old and familiar theme, the relationships between the two Victorian Houses of Parliament.

I have been very busy writing letters to the 'Age' in defence of the State Constitution, that is by supporting the Cain Government in refusing to permit the Assembly (the popular House), formed on adult suffrage of 1,300,000 voters, to be coerced by the conservative Council with about 500,000 privileged voters. However, I don't think the Govt. played its cards as skilfully as it might have done, and now there is a dissolution of the Assembly and it is on the knees of the gods how the voting will go.

In that year the press invited his opinion on the recently proposed bank nationalization legislation but this, he told his family, he resolutely refused to give, because it would take him into politics!

He wrote letters, endlessly. There were great numbers to his daughters. His daughter Marjorie, Mrs David Cohen, made available many of them, some written in 1934 while he was Governor-General, and many written after his retirement between 1936 and 1947. This collection, which is by no means complete, was written for the most part in longhand, though he often used typewriters. Occasionally the ribbon would misbehave and the letter would come

out partly in red type—the typewriter, he would say, had gone 'Bolshevik'. These letters follow a characteristic pattern: they would contain family news, comments on politics, domestic and foreign, discussion of what he was doing or writing or reading, notes on curiosities and matters of interest, jokes and puzzles. An example may be taken quite at random.

Moore Abbey,
Marne Street,
South Yarra
3/8/43

My darling Marjorie,

Your parcel came duly to hand yesterday afternoon. I have not opened it of course, that is a pleasure deferred until the right moment. Thanks very much dear for spotting my weak spots so well. Very acceptable.

I see Duff Cooper has written a new book which he dedicates to the Jewish People with a very complimentary allusion to the good influence they have had upon the world. It is an appreciation of King David. So far all I have seen of it is a Review of the book in John O'London. He seems to have added a great deal of imagination to the Bible to explain some of the incidents. For instance, he says Goliath when he came against David came ahead of his shield-bearer. Then it was so hot that he was perspiring and lifted up the front of his helmet to wipe his forehead. Then David saw his chance and put the stone in his sling and caught Goliath right in the middle of his forehead. Pretty lucky wasn't it? Before that the only explanation I had read of it was that such a thing had never entered Goliath's head before, and so it overcame him. The extracts are all highly imaginative, but never mind, it does a good turn to the Jewish people.

I heard about a Conscientious Objector who still maintained he would not become a soldier. The Board asked him: 'What would you do if a German attacked your wife?' He said: 'I'd bet 3 to 1 on my wife.'

Talking of birthday presents I remember a man saying his wife gave him a present that made his eyes start. 'What was it?' 'It was a collar two sizes too small.'

The other day a man said to his wife 'Really dear, you must economise.' She said 'I am doing it. I am buying everything on credit.'

The Radio gave yesterday the name of a new book called 'Sweet Forgetfulness' by Ann Aesthetic. Did you meet her the other day?

Badoglio seems afraid to move towards Peace. But I think the new bombing will make him fall into line. He is really imperilling

the King. Perhaps he is waiting till the Germans are disposed of in Sicily. Anyhow I should not like to be near Bertolini's in Naples just now. They say 'See Naples and die'. Well it's coming very near it now.

Our love darling. And once more—thanks for 'Pa-rcel'.

Yours affectionately,
Father.

Isaacs' birthday was 6 August and that explained the parcel and the delay in opening it. There were very many letters like this one. Of course the balance varied: sometimes when he was absorbed in some particular controversy, whether a constitutional issue or the issue of Palestine and Zionism, about which he had very strong and dogmatic views, the letter would be devoted largely to that. Deep family affection shone through the letters for his daughters and for his grandson, Tom, and there were always warm, sympathetic and admiring references to his wife. From the latter thirties until the end, there were many references to the difficulties which arose from his brother John's matrimonial problems, and though John died before him, the quarrels which arose from these matters continued to occupy his attention. They led to litigation, and Isaacs was deeply involved and expressed himself vehemently and with anger. There were, as in the letter quoted, frequent references to Jewish matters; whether touching Palestine or Zionism or comments on Jewish custom and history, or religious and theological questions.

There was a mass of other correspondence: with his friend, Rabbi Jacob Danglow, Chief Minister of the St Kilda (Melbourne) Hebrew Congregation, which was largely devoted to religious and theological matters, and also with non-Jewish clergymen.

I have had quite a correspondence [he wrote in April 1947] over the book of Esther with Dr Benson. He condemned the Jews for a 'pogrom' against the Persians—which I repelled. He replied giving other opinions and condemning Esther. I have written at length shewing that the words of 'Esther' do not support him.

He had a considerable correspondence on general matters with his physician Dr Jacob Jona; with Percy White, the Melbourne artist who painted his portrait; indeed with scores of people in Australia and overseas. Many of these letters have disappeared from sight, but the volume of the correspondence which survives bears testimony to the extraordinary energy and vigour of Isaacs in his old age. The correspondence also shows the wide range of Isaacs' reading: in

biblical and theological studies, in general literature, in contemporary political and social writings. He read many journals and newspapers from which he would cull extracts to send to his correspondents. On occasion, he wrote long and detailed book reviews.

In the early years of his retirement he watched the disastrous unfolding of events in Europe. Earlier, while he was still Governor-General, he had written in family letters in 1934 that he believed that Hitler would overreach himself and fall. But it soon became clear that this was wishful thinking. Early in 1938 he expressed his dismay at the weakness and uncertainty of British policy.

> What a dreadful mess in Europe. My sympathies are with Eden. I did not agree with his refusing three or 4 months ago to recognize Italy as to Abyssinia. *Then* was the time to conciliate Italy—*before* Mussolini had been thrown into Hitler's arms. But *now* there is nothing much to gain from Italy, and Hitler will get a free hand in Austria and in my opinion there will soon be the absorption of Czechoslovakia and a war in which Russia and Germany and Italy and France will be engaged. England's prestige is smeared over; and I feel humiliated.

His Austrian forecast was confirmed within weeks. Later that year, not long after the Munich settlement, he was in correspondence with Lord Wigram who wrote a strong defence of Neville Chamberlain.

> We have been passing through some critical times, but thank God, our prayers were answered and the wisdom of the Prime Minister prevailed over weapons of war. Now we have had a good warning and a breathing space to put our house in order. . . . It is difficult to understand why there is now so much criticism against this merciful deliverance.

Isaacs noted on this letter, presumably for his own reply, that he did not agree that Chamberlain was entitled to praise. 'He raised the danger he averted—Hitler continues.' A few months later, in March 1939, in his pamphlet *Australian Democracy and Our Constitutional System* he wrote of the 'Munich Pact of ransom', and he lamented what had happened to Czechoslovakia. No longer, he argued, could Australia or America regard distance as an assurance of security; in due course the predatory aims of the dictators would reach out to them and Australia must look to her defences. In the following month, after Czechoslovakia was gone, he said in a family letter that he was writing to Lord Wigram.

I am going to tell him my improved opinion of Chamberlain —the long lane that has had at last a good turning. His policy, added to Roosevelt's declaration, has taken the 'Hit' out of Hitler and the 'Mussol' out of Mussolini.[2] Hitler is still cryptic: he has to talk big to the Nazis but his note is lowered. And Musso is silent. I think that now Poland, Roumania and Turkey will form up on the right side.

In company with many others, Isaacs did not read the situation very clearly and overestimated the extent to which Hitler could be deterred in 1939, though he had a clearer view than many of the disastrous weaknesses of British foreign policy in these years. He had hopes of Russia, and the Soviet-German non-aggression pact of August 1939 caught him—and many others—by surprise. He also underestimated the Japanese strength.

He followed the war news with keen interest. He was a fervent admirer of Winston Churchill, and as we shall see, his vehement denunciations of political Zionism contained repeated statements that the demands made by the Zionists would 'harass Mr Churchill' in his conduct of the war. After Hitler invaded Russia in June 1941, he welcomed the new ally, and in his letters was critical of those who gave her a cool welcome into the allied ranks.

Throughout these years he followed the course of Australian politics. In 1938 he was involved in public disagreement with the federal government over its handling of the Interstate Commission Bill. His views provoked a public statement from the Prime Minister, J. A. Lyons, that his (Isaacs') view was 'constitutionally unsound and opposed to common sense'. This was the last thing calculated to silence Isaacs who wrote a supplementary letter to the chief president of the Australian Natives Association, which was published in the press, and which dealt at length with the matter.

From no personal objection to the expression, but because I accept 'common sense' as a very good test of the situation as it existed

[2] This was the style of writing which fitted in with the jokes which filled out the letters. Earlier, in a letter to his daughters written on board the *Strathaird* en route from England in November 1936, he wrote: 'Madrid is having a real "go"—the pendulum seems swinging. The Rebel General must be "Frantico". It is all a "Madriddle" so far and we can't guess the answer. Of course we know that the Spaniards must win.' The last sentence is not very clear. Again in February 1942, to Marjorie: 'His name is "Hirohito", but it ought to be now "Hirohitler". Mother has been interested in knowing something about the Japanese religion. She has read that it has to do with "Bushido". I rather think it has to do more with "Ambush-ido".'

when the Bill was introduced into the Senate, I shall put one or two questions, which I ask every Australian to answer from the standpoint of that test.

Then followed the questions. Isaacs' intervention in this matter was sympathetically received in the press. The outcome he chronicled in a letter to Marjorie in July 1938.

> The Interstate Commission Bill was dropped—Lyons said just for the Session. But I fancy it will not have much of a show of going through even then. In any case, my criticisms will lead to a very considerable alteration. . . . When my letter to the A.N.A. appeared Lyons said to the Press (among other things) that my objection to sending it to the expiring Senate was against 'Common sense'. So I tackled that statement by writing a supplementary letter to the A.N.A. which was published in substance in all the morning papers. . . . There is no doubt I killed any chance it had of going through and I feel I have done a real service to the Commonwealth.[3]

In January 1939 he wrote about the dispute between the government and trade unionists over the loading of pig iron for Japan.

> The Port Kembla dispute is still going on. The men have offered to load the *Dalfram* if the Government will promise to block all other pig iron and withdraw the licence rule from Pt Kembla. That wouldn't suit the Broken Hill Co. who want the whole 23,000 tons to go. I hope the men will be firm and stick out their battle for freedom of conscience and action. They are doing nothing wrong. I am engaged on an address on the Constitution and may have something to say about it.

And, of course, he had a good deal to say about it.[4] That dispute gave a famous Australian political leader a nickname which endured for many years. Isaacs' attitudes were in keeping with his political philosophy as expressed far back in his career: he was at once an ardent nationalist and imperialist and a political radical. His wartime and post-war letters reveal a strong sympathy for the Curtin and Chifley Labour governments, and that again was in line with his political outlook. In these years, or at least up to the referendum of 1946, he was active in supporting the cause of constitutional reform, and his views, which argued the case for substantially increased national powers, were received sympathetically in govern-

[3] See Sawer: Australian Federal Politics and Law 1929-1949, at p. 113.

[4] Australian Democracy and Our Constitutional System (March 1939) at pp. 14ff. See p. 248 below.

ment circles, though they did not, for the most part, persuade the electorate.

These constitutional questions and the quarrel over political Zionism were Isaacs' major concerns and involvements during these years. The Zionist dispute was a very unhappy chapter; it became a public quarrel carried by Isaacs into the daily press and was given wide publicity. It placed Isaacs, who was unquestionably the most eminent Jew in the Australian community, and was so regarded by all, Jew and Gentile, in opposition to the organized community voice of Australian Jewry. This is not to say that Isaacs stood alone among Australian Jews in his views on these matters, for there were prominent men in the Australian Jewish community who supported him publicly and privately. But it is certain that the great majority of Jews, speaking through what were then called the Advisory Boards, were opposed to his views and, what is more important, were dismayed and angered and embarrassed by his public actions, which in effect charged those who took the position which he opposed with disloyalty, with impeding and harassing the allied war effort, and, perhaps worst of all, with adopting views about Jewish nationality which were indistinguishable from Nazi doctrines.

The Australian Jewish community was then, and still is, a small one, numerically much smaller than its influence in the Australian community suggests. At the time of the controversy over Zionism in which Isaacs was so deeply involved, it numbered less than 40,000, concentrated mainly in Melbourne and Sydney, though there were active communities in the other capital cities, and still smaller groups in some country areas. Isaacs' own background, as the son of a Polish-Jewish migrant, was quite characteristic; the background of Sir John Monash, though superior in cultural standing, was not very different. Many Australian Jews were either eastern European migrants or the children of such migrants, who had emigrated to escape persecution and privation in the Jewish pales of settlement in eastern Europe. There was a small group of Jews who had come to Australia earlier, some of whom were of German origin, and after 1933 there was a fresh influx of Jews, refugees from spreading Nazi persecution and discrimination in central Europe.

The links between Isaacs and the organized Jewish community were not very strong. In the second chapter, reference was made to his early associations with a group concerned with the relief of persecuted Russian Jews and also with Jewish education in Victoria,

but from the mid 1890s, when he was Attorney-General of Victoria, he had little official connection with Jewish religious or other community organizations. In this respect, there was a marked contrast between him and his distinguished Jewish contemporary Monash who was a prominent synagogue office-bearer and was in addition first Honorary President of the Australian Zionist Federation. Isaacs was not a regular synagogue worshipper; his long-time friend Rabbi Jacob Danglow once said to me that while Isaacs was deeply interested in Jewish religious doctrine and writings, and studied and wrote on such matters extensively, that interest was not expressed in the practice of religious observance, as reflected in synagogue attendance, or in participation in Jewish community affairs. Isaacs was acutely aware of his Jewishness, and it is likely that his strong interests in religious writings and doctrines were nurtured by his mother. We have seen that his letters to her were filled with discussions of biblical and Jewish themes and there also survives a fragment of an undated letter which may well have been written to her, in which he deals at length with the contemporary Dreyfus case, with a strong emphasis on the anti-Semitic aspects of the affair. In his public life, Isaacs was very sensitive to anti-Semitic attacks and responded to them angrily, particularly when, as happened at times in parliament, there were unhappy interjections which suggested an opposition or at least a tension between Jewishness and British citizenship. Nothing was more calculated to provoke Isaacs to anger; throughout his life he took immense pride in his British citizenship and its imperial links, and he was insistent then, as later in the Zionist controversy, that Jewishness was a matter of religion and not of race or nationality. Sometimes the exchanges in parliament were more good-humoured, as when Isaacs, as Attorney-General of the Commonwealth, met a comment by Reid that 'the Right Honourable minister looks as if he would like to eat me' with the response 'The Right Honourable member has forgotten my religion.'[5] Isaacs was, of course, well aware throughout his public life of anti-Semitism. It was not primarily because he was a Jew that Isaacs provoked strong dislike in many quarters, but it is a fact of life that there was then and is now a persistent vein of anti-Semitism in Australia, reflected in exclusionary policies in social and sporting clubs, and in more general

[5] Fitzhardinge: William Morris Hughes (Melbourne University Press 1965) Vol. 1, at pp. 124-5. Fitzhardinge had this story from Sir Robert Garran.

attitudes. Barton, in expressing his dislike of Isaacs to Griffith in 1913 wrote of the 'jewling', and while one should not make too much of a word, we can be sure that what was said about him by colleagues in clubs and other private places not infrequently touched on his Jewishness.

In his family letters in the years of his retirement, Isaacs often wrote on various Jewish themes. In a letter in 1942 he wrote:

> I wish the Synagogue would alter that absurd fashion of sticking women up away from the men. It is only the survival of the old Oriental custom of veiling women from strange men. I believe they have abandoned it in at least one Synagogue in Melbourne. Some of these days I am going to write something about it.

Four years later, he gave over practically the whole of such a letter to a list of Jewish curiosities, including the custom of wearing hats in synagogues. He wrote about the law forbidding the mingling of meat and milk. He discussed Jewish theological doctrines and their links with later Christian doctrine at length.

During the years of his public life, and later in retirement, he was invited to attend and speak at various Jewish functions in synagogues and other communal places. In May 1939 he made a fine speech on the occasion of the laying of the foundation stone of a Jewish old people's home in Sydney. On this occasion he referred to the Nazi persecution of the Jews and to the opportunities for a free life for Jews in Australia.

> Our history is almost wholly one long record of tribulation, struggle and suffering. With gratitude in our hearts, we acknowledge the enlightened and gracious repudiation by the liberty-loving peoples of the earth, of the brutality and slanders of modern barbaric Paganism.

It is certainly not the case that Isaacs was insensitive to the horrors of Hitlerism, to which he made frequent reference in his speeches, his letters, and his writings. From the end of 1938, Nazi persecution of the Jews entered a new phase of intensity, and in January 1942 the horrifying 'final solution', the systematic extermination of European Jewry, was set in motion. By the end of 1942 the scale of the massacres of Jews in the Nazi concentration camps was becoming clear to Jews outside Europe, and the need for urgent action to save the remnant became a matter of desperate necessity. By the last quarter of 1943, when Isaacs developed his major attacks on political Zionism, it was estimated that between three and four

million European Jews had already gone to their deaths. To Australian Zionists it appeared that the main hope of saving the remnant lay in opening the gates in Palestine to permit large-scale Jewish immigration, but this was denied by existing British government policy, which was expressed in the MacDonald White Paper of 1939 which, if implemented, would have brought Jewish immigration into Palestine to an end by March 1944, except with the consent of the Arabs which would not have been forthcoming. So at the moment of greatest need—and allowing for the appalling difficulties of getting Jews out of their hideous European prisons—the doors of the country which seemed to many the only possible haven were shut as an act of British policy. Nor was it clear that the doors of other countries were open to the refugees. On 28 October 1943, in the *Hebrew Standard* of New South Wales, Isaacs wrote the first of his long articles on political Zionism which took the form of letters to the editor of that paper:

> In specially asking the serious attention of the Jewish Community to the subject of Political Zionism at this juncture I wish to make my purpose clear.
>
> With all my Australian co-religionists I share to the full their deep and sincere anxiety for the rescue and salvation so far as humanly possible of the 'Morituri' millions of Jewish victims and all the other millions of oppressed and tortured peoples in Hitler's sadistic power or control.
>
> But I am perfectly convinced that the present and future fate of the Jews of the World, both the potential and actual refugees, and even those who happily are far outside the danger zone of Nazism and the countries presently under its coercive influence, is most seriously prejudiced by the advocacy of Political Zionism in any form and under any guise.[6]

To understand the issues both generally and in the particular context of Isaacs' intervention, it is necessary to give some general account of Zionism and of developments in Palestine under the mandate which had been given by the League of Nations to Britain after the first world war. Zionism was the Jewish national movement whose goal was the establishment of a Jewish national home in Palestine, the ancient biblical homeland of the Jews. The modern father of Zionism was Theodore Herzl, an assimilated Austrian Jewish journalist who in 1895, having witnessed with dismay the violent expressions of anti-Semitism which occurred in

[6] Hebrew Standard, 28 October 1943, at p. 2.

the wake of the Dreyfus case, wrote *Der Judenstaat* in which he argued, as a matter of necessity, for the establishment of a Jewish national territory, since anti-Semitism appeared to render impossible any other normal existence for Jews. He followed this up by organizing a political structure for Zionism, and in 1897 convened the first Zionist congress in Basel. At the time of his death in 1904, the Zionist movement was sharply split over the issue of accepting from the British government for Jewish settlement an area in the uninhabited highlands of Uganda. To a substantial body of Zionists this was unacceptable, as indeed was any territory other than the ancient promised land of Palestine. In the years that followed, it became clear that Zionism had meaning only in terms of Palestine which was then under Turkish suzerainty.

During the first world war, when the major active centre of Zionism was in Britain, and one of its principal leaders was Chaim Weizmann of Manchester University, who was later to become the first president of the independent State of Israel, substantial links were established with the British government, and in November 1917, Arthur Balfour, then Foreign Secretary, wrote to Lord Rothschild that:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

The Balfour Declaration, as it has since been known, was an official statement of British government policy. Its origins have been the subject of much discussion[7] and its publication provoked differences of opinion among British Jews. Some distinguished leaders of the Anglo-Jewish community expressed their opposition to it on the ground that it posed a problem of 'dual loyalty' for British Jews, that is to say a conflict between loyalty to Britain and to the national home. In the post-1918 settlements, the Council of the League of Nations approved a British mandate for Palestine, which in its preamble included the Balfour Declaration and provision to facilitate Jewish immigration into Palestine.

[7] The most authoritative study is by Leonard Stein: The Balfour Declaration (Vallentine Mitchell, London 1961).

It was hoped that the Arabs would not oppose the Jewish national home in what Balfour called this 'little notch' of Arab land, and in 1919 meetings between the Emir Feisal, later King of Irak, and Weizmann gave promise of harmony and agreement. But Feisal did not speak for the Palestinian Arabs, and in 1920 and again in 1921 disturbances occurred in Palestine, and the first of a line of Commissions of Inquiry identified the source of conflict as the policy of establishing the Jewish national home. The Haycraft Commission in 1921 recommended restrictions on Jewish migration, and in 1922, in answer to an Arab delegation, the British government issued the Churchill White Paper—named for the Colonial Secretary—in which it defined its policy as providing a Jewish national home *in* Palestine, not a Jewish Commonwealth *of* Palestine. The economic capacity of Palestine to absorb migrants was to be a control factor in determining levels of Jewish immigration, but within such limits Jews were to enter Palestine as of right and not on sufferance. Transjordan was excised from the area of Palestine subject to the national home provisions of the mandate. The Arab delegation rejected the propositions stated in this White Paper, but there was no further serious disorder in Palestine until 1928-9. The Shaw Commission then found that the causes of the disorder which occurred at that time were to be discovered in Arab opposition to the establishment of the national home, and in 1930 a new British White Paper severely restricted Jewish migration into Palestine. This, in turn, provoked strong Jewish protest and Mr Ramsay MacDonald, the British Prime Minister, gave assurances to Dr Weizmann that there was no intention of deviating from the policy of establishing the Jewish national home. Amid these vacillations, the advent of Hitler in 1933 caused a sharp rise in Jewish immigration into Palestine, and further violence occurred in that year. In 1935, the main Arab parties made a joint demand for the cessation of Jewish immigration and of land sales to Jews, and for the termination of the policy of establishing the national home. The High Commissioner, Sir Arthur Wauchope, laboured unsuccessfully to produce some measure of agreement, and in 1936 violence broke out yet again. This time to the Arab demands was added a demand for an independent Arab Palestine, and on this occasion there was support for these Arab claims from the neighbouring Arab states.

The Peel Commission of 1937, which on this occasion exhaustively

examined the situation, produced a distinguished report[8] which made the point that the events of 1937 constituted 'open rebellion of the Palestine Arabs assisted by fellow Arabs from other countries against British mandatory rule'. It could find no practical solution to the Palestine problem other than partition, the solution which, more than a decade later, was to be adopted by the United Nations, and in 1948, three months after Isaacs' death, produced the State of Israel. The Jewish leadership indicated its willingness in 1937 to negotiate on the basis of a partition proposal, but the Arabs rejected partition. Another commission which was despatched to Palestine to work out the details of partition encountered great difficulties. In the midst of all this there were fresh outbreaks of violence in which the Palestinian Arabs again had the support of outside Arab elements. The British government abandoned the partition proposals and summoned Arab and Jewish representatives to a conference in London. The Jews protested in vain that the representatives of Egypt, Irak, Transjordan, Saudi Arabia and the Yemen had no *locus standi*, and the conference yielded no agreement. Then the British government in 1939 produced another White Paper, the MacDonald White Paper, named for Malcolm MacDonald, Colonial Secretary in the Chamberlain government. It fixed quotas of admission of Jews into Palestine for the period March 1939 to March 1944, totalling 75,000 in all. Thereafter no further Jewish immigration was to be permitted save with Arab consent. It contemplated within a period of not less than ten years the establishment of a Palestinian State in which, by reason of the cessation of Jewish migration, the Jews would be in a permanent minority.

This statement of policy was strongly opposed by Jewish spokesmen; it was attacked in the House of Commons by Winston Churchill, then a private member, who said in substance that it was inconsistent with the undertakings to which Britain was committed in accepting the mandate, and the Permanent Mandates Commission also found it to be inconsistent with the mandatory obligation. Reference to the Council of the League was prevented by the outbreak of war in 1939. In February 1940 the British government, again over Jewish protest, issued regulations which severely restricted the transfer of land in Palestine from Arabs to Jews. With the war, an allied military presence in Palestine brought violence to an end, temporarily at least, and this was the situation

[8] The principal author was the British historian, Sir Reginald Coupland, who was a member of the Commission.

in which Isaacs launched his attacks on political or extreme Zionism, as he described the doctrines which he assailed. The situation was frustrating for all parties; for the mandatory power which was subject to obligations under the mandate which it plainly believed to be unworkable, and for which, in any event, it now had little sympathy; for Zionists whose demands were given added urgency by the unfolding of the Hitler horror, and for the Arabs who had become increasingly intransigent in their demands that Palestine should become an Arab land, and who had been encouraged in these demands by the concessions which each outburst of violence had won for them.

Isaacs' opposition to Zionism went back to earlier days. In the 1920s he had declared himself, and his views then were substantially those of the early English anti-Zionists who had opposed the Balfour Declaration. He saw himself as a British subject of Jewish religion for whom Zionism posed the unwanted and undesirable complications of a dual loyalty, since it implied a Jewish nationality which he wholly repudiated. In 1937, in a family letter, he spoke of 'dangerous Zionistic' doctrines. In November 1941, in a letter to a sympathetic Jewish publisher, he made quite clear his determination to oppose Zionists and Jews who were protesting the policy of the 1939 White Paper:

> There is I hold a stern duty to perform in order to preserve the Jewry of this country of Australia from the strain of ingratitude to the glorious Empire that is the greatest bulwark of tolerance and freedom in the world at this instant, and from the charge so often made against our people that Jewish Solidarity overshadows Loyalty to the Land that admits us to every kind of equality.
>
> I consider that the pressure that has been put upon you, as you state it, is absolutely Un-Australian. And I am determined that the matter shall not rest there. If the pressure is maintained, that is if it is not distinctly withdrawn, I shall take steps to open up the whole question of Zionism in the public Press. That is our simple duty to our King and Country in this hour of trial. I shall do so with some regret, because it will inevitably involve some we know and respect in the necessity of trying to justify their actions to their fellow citizens. But that cannot be helped. They must either retract what I consider, and what their fellow citizens would consider, an improper course, or take the consequences. It is a duty also to the general body of Jews, who would rather die than imperil the Empire by a course that has been so clearly and fully pointed out in the Articles that have appeared.

It has to be borne in mind that what Isaacs was so angrily writing about was public protest against policies which those making the protest (and there can be little doubt that they constituted a large and very responsible body of Australian Jewish opinion) believed to be contrary to the obligations of the mandate, and which in their view jeopardized the survival of the Jews of Europe. The holocaust gave growing urgency to the demand to open the doors of Europe: Palestine, it was clear, was the only real hope then and later, for even when the war should come to an end with Hitler's defeat—and at this time that seemed far away—it was scarcely credible that surviving Jews would wish to live in a Europe which had been a charnel house for their families and co-religionists. Public protest against the White Paper—and each month brought nearer the time when, in March 1944, *any* further migration would depend on Arab assent—in no way involved dissociation from the allied war effort. Indeed Australian Jews, in company with Jews elsewhere, had the most urgent reasons for wishing the destruction of Hitler and Hitlerism.

Nothing could persuade Isaacs of this Jewish case. In these years he poured out thousands of words denouncing extreme or political Zionism. In July 1942 he warned against the holding of a protest meeting by the State Zionist Council of New South Wales, on the occasion of the *Struma* tragedy. The *Struma* was a ship which was carrying illegal immigrants from Romania to Palestine. Most of them were refused entry into Palestine and the ship sank in the Black Sea with heavy loss of life. The protest, of course, was directed at the policy of the 1939 White Paper. In a long article in the *Hebrew Standard*, Isaacs charged that the tragedy was being exploited by the 'Extreme Zionists' to bring pressure on the British government to establish a Jewish State in Palestine. This, he said:

> would be unjust to and would antagonise the Arab population in Palestine, would exasperate the whole Moslem world, would imperil the Empire, endanger the Cause for which we and our Allies . . . are fighting . . . and would be contrary to the desire of the Christian world to preserve intact the objects and places in Palestine which it holds sacred. Compared with the momentous consequences of antagonising the Moslem millions in Egypt, India, Turkey and the Arabias, who oppose the subjection of their Arab brethren in Palestine to Jewish rule, either by law or by a Jewish immigration

sufficient to swamp them, the case of the *Struma*, dreadful as it is, would become a trifling incident.[9]

Between this time and the end of 1943, Isaacs wrote many articles in the *Hebrew Standard* attacking the 'Extreme Zionists', and charging that public protest against the White Paper was an act of harassment directed at Mr Churchill and the effective prosecution of the war. These culminated in three long letters published in the issues of the *Hebrew Standard* of 28 October 1943 and the two successive weeks, under the title of Political Zionism. Isaacs at this time was eighty-eight. The argument was developed in vintage Isaacs style, with a *copia verborum*, a wealth of citation of writers and authorities, and with a denunciation of doctrines described by him as 'pestilent', and 'senseless absurdities'. Some of the things he said could not at that time have been more shocking to Jewish sensibilities.

> It (political Zionism) . . . is founded on principles that bear a striking resemblance to the slanderous doctrines that Hitler put forward in justifying Anti-Semitism. . . . It is moreover highly dangerous to the Empire, harassing to the British Government in a critical hour; it is unjust to another great People; and in view of the consequences that have been plainly, repeatedly and authoritatively pointed out, is ungrateful to the Christian world. Finally, it is impossible, but the incessant attempt to attain it detracts from the noble principles of our religion.

Isaacs made various points. He insisted that the notion of a Jewish nationality had no validity; Jews were citizens and nationals of Australia and other countries; they were Jews only by religion. To speak of a Jewish nationality and to regard Palestine as 'home' was to state a doctrine which

> might well have been taken as a paraphrase from Hitler's 'Mein Kampf'. The establishment of a Jewish State in Palestine would deny equal rights of citizenship to Arabs and others, and would imperil the security of the Holy Places of other faiths. To grant the demands of the political Zionists would provoke the Arab and Moslem with untold and possibly disastrous consequences for the Allied war effort.

This argument was pressed with much emphasis and rhetoric at a time at which the end of Jewish migration into Palestine appeared to be fast approaching; if the White Paper of 1939 was to

[9] Hebrew Standard, 2 July 1942, at p. 1.

be implemented, migration of Jews, otherwise than with Arab consent, would end in March 1944. By this time it was believed that more than three million Jews had perished in Europe. In November 1943 the Jewish Advisory Boards, which then officially represented the Jewish communities of Australia, took the unprecedented step of communicating their views to the Australian government. They called on the Australian government to adopt a liberal migration policy into Australia, and, among other things, to urge the British government to renounce the MacDonald White Paper, which, it was said, would soon stop Jewish immigration into Palestine 'in direct violation of the Balfour Declaration of 1917'. The three articles on political Zionism by Isaacs appeared contemporaneously with this communication. Moreover, making good the threat in his earlier letter of 1941, on 8 November 1943 Isaacs notified a leading member of the Melbourne Jewish community that if a projected White Paper protest meeting, scheduled to be held on 15 November, was not abandoned, he would state his views in the daily press. The undertaking was not given as he demanded, and on 13 November his letter appeared in the Melbourne daily papers. In that letter, he said that if the purpose of the meeting was to register a protest against the 1939 White Paper,

> leaving the matter to be dealt with by the British Government calmly after the war, I should regard it as a very proper request. But if, as is not improbable, it is to follow the peremptory demand of the Australian Zionist Conference held in Sydney last May for the immediate repeal of the White Paper and the opening of the doors of Palestine to free Jewish immigration, and that without any consideration for conflicting interests, it will be playing with dynamite.

Then followed the arguments about the impact on the Moslem world and finally an expression of hope that

> At this fateful hour I trust that nothing will be said or done to harass the British government or give an opportunity for Nazi propaganda to antagonize the Moslem peoples.

The meeting was held on 15 November; it was crowded and enthusiastic. Feeling against Isaacs ran high. For the greater part of his life he had taken little part in Jewish community affairs, and had shown little public interest in the community. Now, it seemed, he had chosen, at a time of unparalleled tragedy, to use

his name and influence to brand as traitors to the allied cause fellow Jews who believed strongly in the desperate need to open the gates of Palestine to European Jewish refugees. Sections of the Australian press praised his action, and rebuked those he was attacking. The *Bulletin* wrote that Isaacs, in a series of articles replete with 'wealth of argument, learning, apposite quotation, irony and passionate loyalty to Australia, the British Commonwealth and the cause of the United Nations . . . has shot the Zionist case to pieces'.[10] The article, which was headed 'Playing with Fire', drew attention to gun running in Palestine and warned that if disorders broke out again in that country 'the blood of the victims will be on the hands of the Zionist agitators who have attacked and weakened British authority'. Two weeks later, reporting on riots in Tel Aviv and on the holding of the Melbourne meeting on 15 November, the *Bulletin* commended Isaacs and berated the organizers of the meeting.

There is no doubt that Isaacs had some influential support in the Jewish community and in sections of the Jewish press, but Jewish opinion was overwhelmingly against him, both against his cause and his use of his authority in advocating this cause. At this time, Julius Stone, who had come to Australia from New Zealand in 1942 as Challis Professor of International Law and Jurisprudence in the University of Sydney, undertook the task of answering Isaacs. He did so in a series of long and detailed articles in the *Hebrew Standard*, the first of which appeared on 2 December 1943. Isaacs replied immediately and his first response was in the *Standard* for 9 December. He took the unhappy and absurd course of attacking the appendage of Stone's academic degrees to his name in the heading to his article.

> No doubt exists in my mind that in writing that letter Professor Stone is the victim of men behind the scenes stronger than himself. Why all this unusual blazoning of decorations for this occasion? That is quite out of the course of an ordinary newspaper letter, where facts are left to speak for themselves.[11]

It was, of course, no more an ordinary newspaper letter than were Isaacs' massive letters. On 30 December he spoke of Stone's 'defence of the Zionist effort to harass Mr Churchill, and of the foredoomed attempt of the Extremists to establish Palestine as a

[10] 17 November 1943. [11] at p. 5.

"Jewish State".'[12] Neither man minced words in writing of the other. Stone followed up this serial publication of his answer to Isaacs, which Isaacs met week by week with a lengthy and vigorous replication, with a revised publication in pamphlet form entitled *Stand Up and Be Counted* which appeared early in 1944. It was sub-titled 'An Open Letter to the Rt Hon. Sir Isaac Isaacs', and contained, in addition, a postscript on the White Paper of 1939.

Stone assailed Isaacs' 'exuberant and reckless dogmatism' and his 'exaggerated and misleading advocacy'.[13] On the substantive issues, he dealt in detail with Isaacs' arguments. Stone argued that there was no danger that in a Jewish Palestine the rights of non-Jews would be prejudiced; it had been Zionist policy to assure equal rights of citizenship to non-Jews. As to this it may be said that in contemporary Israel, Arabs are constitutionally assured of equal rights, but it is the fact that Arabs complain, and with justification, that they are subject to restrictions and special controls. This is justified by the Israeli government by reference to security considerations in a tense and difficult situation. The reality is that there was and is a core of truth in Isaacs' point that minority status threatened the position of the minority, and this was not effectively answered by a statement of Zionist undertakings or policy, but Stone effectively showed that Isaacs' defence of the *status quo* would have left the Jews as a permanent and very insecure minority in Palestine. Stone dealt effectively with Isaacs' arguments on dual loyalties and Jewish nationality: these were and are the weakest of the anti-Zionist arguments, for there is no real difficulty in reconciling a particular nationality or citizenship with a general Jewish culture and sympathy, and with support for and pride in a Jewish national home which is available for those Jews who may wish to live in it. Subsequent history has surely shown that the dual loyalty argument has little substance, precisely for the reasons that Stone set out. He dealt ably with Isaacs' copious citation of authority and demonstrated in a number of cases that Isaacs had quoted out of context. In this respect there is simply no doubt that Isaacs had dealt unfairly with his authorities. Stone likewise had the better of the historical argument. Ultimately he made the point that the opening of Palestine to large-scale Jewish migration furnished the only real hope of salvation for substantial numbers of surviving

[12] Hebrew Standard, 30 December 1943, at p. 6.
[13] Stand Up and Be Counted, at pp. 47, 67.

European Jews. On the other hand, Isaacs' arguments that a reversal of migration policies would gravely disturb the order of the Arab and Moslem world were not fully answered. It was not that the allied cause could count on the support of an appeased Arab world; it was that a Jewish Palestine, or a Palestine open to large-scale Jewish migration was a (though certainly not the only) factor making for instability in the Arab world.

Zionist arguments raise great passions and few men who are personally involved on either side can be sure that their judgments on these matters are not in some degree distorted. But it is fair to say that Isaacs' arguments were grotesquely overstated and were unbalanced. His energies were poured into a dogmatic, overbearing exercise in advocacy. Allowing for his great age, this episode reveals Isaacs in an unhappy light, as willing to take any point, however mean or trivial, to further his argument. He had an unassailable conviction of rightness and a determination to press his case whatever the cost in embarrassment or hurt to those who opposed him. This is the chapter in his life which, while it bears testimony to his extraordinary capacities and energies at a very great age, reflects little credit upon him.

In republishing his answers to Isaacs in *Stand Up and Be Counted*, Stone and those for whom he spoke were concerned to bring their case before a wider public than would have been aware of it through publication in instalments in the Jewish press. Specifically it was hoped to bring the Zionist case to the attention of the Australian government, and particularly to the attention of Dr Evatt, then Minister for External Affairs, to whom a copy was sent. The hope was that the government might become acquainted with the issues, not only from Isaacs' side, and might be encouraged to explore the matter and to express views on future Palestine policy. The publication of Stone's attack on Isaacs' position greatly angered Isaacs who saw in it a personal attack, as indeed it was in part. Isaacs had given the controversy its unhappy personal character, with his intemperate denunciations of positions and persons and there was a strong temptation for Stone to make a like response, and indeed he did so, though in terms much milder than those employed by Isaacs. Before he wrote the letters which finally appeared in *Stand Up and Be Counted*, Stone had had some exchanges with Isaacs on the subject, but these were not such as to provoke a personal breach. Stone, already a distinguished scholar, had visited Isaacs and had exchanged some letters with him, and had sent him a

copy of his recently published *Atlantic Charter*. In January 1945, Stone tried to heal the breach and wrote to Isaacs enclosing a recent publication. He received a stern reply:

> It would be both unprofitable and distasteful to point out the many respects in which your pamphlet in reality addressed not merely to the Jewish Community but to the general public of Australia and beyond was a personal and unjustifiable attack upon myself. . . . I am sorry the occasion has arisen compelling me to say even so much. I regret that in the circumstances it is plainly impossible for me to recede from the position I have taken in returning your brochure.

In June 1947, at a time of great tension in Palestine, when acts of terrorism had embittered relations between Jews and the British government, army and mandatory administration, and had aroused the ugly spectre of anti-Semitism, Isaacs recalled the events of late 1943.

> It is dreadful [he wrote to Marjorie] to have the whole Jewish Community in Australia pictured as hostile to Britain. But that is the result of extreme Political Zionism. You must remember when meetings were called in Sydney and Melbourne openly condemning Britain for not yielding to the Zionist 'demands' for a Jewish State and unlimited immigration, I wrote in favour of Britain and said she was our best friend. What happened? I was openly abused! 'A Lone Wolf' etc. etc. (named people) covered me with abuse. And now they in the *Standard* protest closest attachment to Britain.

Isaacs never shifted from the view of Zionism which he stated so forcibly in the early 1940s. For the most part, however, he did not again enter into public debate but confined himself to private meetings with Jewish leaders, both Zionist and non-Zionist, and to comments in private letters. His public statements on Palestine and Zionist and Jewish matters were rare.

In 1944 acts of terrorism occurred inside and outside Palestine. In November of that year, Lord Moyne, the British Minister of State in the Middle East, was murdered in Cairo by Jewish terrorists, members of the Stern gang. This senseless act shocked the official Zionist leadership, which dissociated itself entirely from it, and provoked angry comments from Mr Churchill in the House of Commons. At this time also Zionist demands for the repudiation of the White Paper and for the establishment of a Jewish Commonwealth in Palestine grew stronger and were indeed

encouraged by British Labour Party resolutions in 1943 and 1944, so that when the Labour Party came to office in the British election of July 1945, the Zionist leadership had high hopes of a major shift in Palestine policy. Isaacs commented generally on the outcome of that election in a family letter.

> As to the English elections I too am angry that Churchill is not permitted to finish the war. But it is his misfortune that he had to try to carry on his back the crusted Conservative party. If *he* could have been accepted without the Beaverbrook crowd, he would have been. But he couldn't like Atlas carry the *Old* World on his shoulders —Not even to reward him could the struggling masses consent to five years more of Tory government.

The soundness of this estimate of the reasons for the British electorate's refusal to take Churchill as a post-war minister may be open to question, but what is extraordinary is that this sort of judgment was made by a man less than a week away from his ninetieth birthday.

Zionist hopes that the change of government would bring a significant change in British policy in Palestine were not realized. In the cold war, the Middle East was an area of major strategic importance, and decisions on Palestine policy might significantly affect its stability. On this point Isaacs was certainly right, though not necessarily in his conclusions as to what should therefore be done in Palestine. America, through her new international involvements and because of her oil concessions, now had strong interests in the Middle East, though the diverse pressures of American politics made for bewildering inconsistencies in her Palestine policies, which in turn maddened the British Foreign Secretary, Ernest Bevin, who had publicly staked his reputation on his capacity to solve the Palestine problem. Bevin, a strong and inflexible man, was temperamentally ill-equipped to deal with this extremely difficult and complex problem; few would doubt that his handling of it was a complete failure and ended in frustration and an angry British withdrawal. In the years between 1945 and 1948 outbreaks of terrorism and angry British military responses produced an extremely tense and ugly situation.

The immediate post-war demand of the Jewish Agency was for 100,000 immigrant permits for the settlement in Palestine of European Jewish survivors of the holocaust. In May 1946 the joint Anglo-American Commission which examined the situation in

Europe and in Palestine unanimously recommended the grant of these permits, the abrogation of the White Paper of 1939, and the establishment of a bi-national Palestine under international guarantees. All these recommendations were rejected by the British government, and following this rejection acts of terrorism broke out afresh. The British administration clamped down severely on illegal immigration, and operations 'to restore law and order' were undertaken by the mandatory administration. At the end of June 1946 the Administration ordered the arrest of leaders of the Jewish Agency, and throughout the country many Jews were detained for complicity in acts of violence. The response to these arrests was an appalling act of terror in which Irgun, a terrorist organization, on 22 July 1946, blew up a wing of the King David Hotel in Jerusalem which housed the secretariat of the Mandatory Administration and also served as British military headquarters in Palestine. Over ninety people, British, Jews and Arabs, were killed, and almost fifty were injured. This act of violence was given wide prominence throughout the world. On 25 July Isaacs wrote to Marjorie that the 'Bomb Horror' had driven him to immediate action. He said that he would refrain from making any public statement if he was given assurances that appropriate action would be taken by the leaders of various official Australian Jewish bodies, Zionist and general, to condemn this act of terrorism. He noted that he had been given the required assurances and that statements from Jewish leaders had appeared in the daily press.

> The honour of Jews throughout the world [he wrote] demands the renunciation of Political Zionism. I am to see Danglow[14] again this afternoon. In all this one stark fact is this—The Jewish Agency *is* the Zionist Organization. *No wonder* anti-Semitism exists.

Four days after the explosion, General Sir Evelyn Barker, the General Officer Commanding in Palestine, in a confidential letter to all his officers, directed non-fraternization between British troops and Jews. This unfortunate document charged Palestinian Jews generally with complicity in acts of terrorism, and was strongly anti-Semitic in tone. It reflected the angry frustration of the times, and it was copied by Irgun on a poster and widely displayed in Palestine. The British government formally dissociated itself from the letter. It appalled Isaacs, who moved immediately into action which he recounted in a family letter:

[14] Rabbi Jacob Danglow.

I send you hastily copies of the letter I sent—or rather took—to the press last evening. I was terribly shocked at General Barker's slanderous statement. It was like a scorpion's tail—where the sting was.[15]

I telephoned Danglow and in the result typed the letter. Mother was very helpful in its composition.

I did not finish till 8 p.m. and then Danglow took me to the *Age*, *Argus* and *Sun*. I got home at 10, the latest for a long time. That and Tom's wedding reception hold the record. I don't believe at that hour the letter would have been inserted had I not gone. The *Argus* put it on the 'Leader' page.

The *Sun* has it too. So I send it. I am glad I acted promptly, because I see by the other *Argus* cutting that the Palestine Jews are protesting also.

The letter expressed 'the indignation of the general Jewish community at the indiscriminate slur and undisguised anti-Semitic words' of Barker's statement and called for 'official reprobation' of this 'uncalled for, offensive and unjustifiable outburst'. At the same time he deplored the failure of the Jewish Agency to use more than words in dealing with terrorism. He also deplored what he regarded as inflammatory speeches by a political Zionist emissary in Australia. So in this letter he had a little of everything.[16]

Isaacs' repudiation of political Zionism did not spring from any desire to conceal his Jewishness; he was always ready to use his influence to attack anti-Semitism, and indeed he now saw political Zionism as a force making for anti-Semitism. So, a week before his ninety-first birthday, he was being driven about the town, at a late hour, personally delivering his letters to the daily papers. A few months earlier, in October 1945, he had been stirring up a local Jewish body to cable President Truman to request his intervention to prevent a recurrence of 'anti-Semitic outrages' by the *Peronistas* in Argentina. In September 1946 he wrote to Marjorie that he had had a telephone call from Philadelphia from a leading American Jewish anti-Zionist in which he

asked me to cable the Foreign Office opposing a 'Jewish State'. I did so, adding that my opinion was that of a considerable body of

[15] Barker's letter concluded: 'I appreciate that these measures will inflict some hardship on the troops, but I am certain that if my reasons are fully explained to them they will understand their propriety, and they will be punishing the Jews in a way the race dislikes as much as any—by striking at their pockets and showing our contempt for them.'

[16] Argus, 31 July 1946.

Australian Jewry, including numbers of returned Jewish service personnel.

Terrorism continued: beatings of terrorists provoked beatings of British soldiers. A 1946 proposal for a federal Arab-Jewish Palestine, which had British and American sponsorship, came to nothing. In 1947 the hanging of Jewish terrorists by the administration produced as a reprisal the hanging of two British sergeants by the terrorists. Their bodies (one with a booby trap attached) were discovered at Nathanya on 31 July. It was an appalling episode and provoked anti-Semitic reactions in England. Isaacs felt very strongly that terrorism in Palestine would arouse anti-Semitism.

> The Terrorists—or rather the fighting forces of the Extreme Political Zionists [he wrote, in April 1947] are a perfect horror. If ever there could be an excuse for Anti-Semitism they would be that excuse. And why cannot 700,000 Palestinian Jews put down the 4000 Terrorists? Where does the money come from for grenades and bombs etc.?

Of course he was wrong in wholly identifying the terrorists with the fighting forces of the Zionist movement, but he could not be persuaded of that.

Isaacs never budged from the positions which he had taken up on the issues of Zionism; so far from persuading him, Stone's arguments convinced him of his own rightness. Of course Stone did not write to persuade Isaacs, but to set the record right as he, a confirmed Zionist saw it, and to get that record before the Australian government. In this Stone had a substantial measure of success. There can be little doubt that what he wrote was read by Evatt, and in November 1947 Australia voted in the General Assembly of the United Nations in favour of the termination of the mandate and the partition of Palestine into independent Jewish and Arab States. When the British government referred the Palestine issue to the United Nations in February 1947 declaring that the mandate had become 'unworkable', the United Nations appointed a special committee on Palestine (U.N.S.C.O.P.) which unanimously recommended that the mandate be terminated and that Palestine should become independent at the earliest possible date. A majority in the committee voted in favour of partition of Palestine into separate Arab and Jewish States, with a separate status for Jerusalem under U.N. trusteeship. All three were to be linked in an economic union. The minority favoured a federal

state. On 29 November 1947 the General Assembly voted to accept the majority report by a vote of 33 to 13 with 10 abstentions. In the majority were the United States, U.S.S.R. and Australia, while the United Kingdom abstained.

The last days of the mandate were bitter, and fighting broke out immediately after the United Nations resolution. Britain was called upon to evacuate Palestine not later than 1 February 1948, to provide a seaport and hinterland for Jewish immigration, to turn the administration of the country over to the United Nations Palestine Commission as evacuation took place, and to take no action to impede implementation of the resolution. The British government did not comply with these terms, and the Palestine Commission which was appointed by the General Assembly said so in February 1948. Because of the fighting between Arabs and Jews which had broken out, it seemed, early in 1948, that there might be a retreat from the General Assembly Plan. The Jewish Agency declared its determination to stand firm in its demand that the plan be implemented. On 14 May 1948 the British High Commissioner left Palestine and the State of Israel was formally proclaimed. Immediate *de facto* recognition was given by the United States, followed by Russia and then by most of the western powers. In the very moment of its birth, the State of Israel had to fight for its life against invading Arab armies. Miraculously, as it seemed to many, the State maintained itself against armed attacks, and armistice agreements were signed at Rhodes early in 1949 between Israel and Egypt, Lebanon, Jordan and Irak. From these agreements emerged a Jewish State of Israel though not in the precise form which the General Assembly resolution had contemplated.

This goes beyond Isaacs' lifetime, for he died on 11 February 1948. No letters or papers dated later than mid 1947 and bearing on the Palestine issue are available to me. In October 1945 he had written that 'the Political Zionists have no chance for a Jewish State . . . what I now fear is that their militancy may cause an Arab State'. In little more than two and a half years, events proved him wrong, though no one, including the Zionist leaders he so vigorously denounced, could in 1945 have predicted the future with much confidence.

10

The Last Years

ADVOCATE OF CONSTITUTIONAL REFORM

IN 1946 Isaacs published a series of articles in the *Age* newspaper in support of the federal government's proposals for amendment of the Commonwealth constitution. Those articles were republished in pamphlet form under the title of *Referendum Powers: A Stepping-Stone to Greater Freedom*. In the course of his argument he referred to a statement made in the Senate by an opponent of the proposals who had said that the constitution had stood the test of time. This, said Isaacs,

> reminds me of the many centuries Chinese women had endured the tiny shoe of their childhood which crippled them in later life. At last they discarded it. I hope the Chinese shoe of our constitution, nationally and individually, will be discarded and that we shall take to ourselves the power to walk upright in comfort, prosperity and with a good conscience.[1]

He was much attracted by the Chinese shoe metaphor and had used it in a similar context on an earlier occasion. This was his last major venture as a publicist, and he was ninety-one when the pamphlet appeared. He had worked hard at it: in July 1946, in a letter to Marjorie which was mainly devoted to the Palestine issue, he wrote:

> I have been terribly busy over my Referendum articles. What with one thing and another I have not been able to send you and Nance all the articles that have appeared and I shall do so now, as I have just had typed a concluding one.

In September he wrote: 'My referendum articles have been taken up and are to be published today with added comments on

[1] Referendum Powers: A Stepping-Stone to Greater Freedom (Melbourne 1946), at p. 25.

Menzies' and Fadden's policy speeches.' This letter also contained its budget of news of what was happening in Zionist (in this case anti-Zionist) affairs, for no single issue ever commanded Isaacs' attention and energies to the exclusion of all others.

After his return from Europe late in 1936, Isaacs was much involved, as a speaker, pamphleteer and occasionally as a broadcaster, with constitutional and political issues. The interpretations of section 92 of the constitution by the High Court and Privy Council in the years following his retirement from the Bench concerned him—provoked is a more apt word—greatly. The decision of the Privy Council in *James v. Commonwealth*[2] greatly displeased him. In March 1939 he published a pamphlet in which he devoted considerable attention to section 92 and its aberrant interpretations.[3] In the following month in a family letter he wrote: 'I am engaged on another pamphlet—as to the P.C. decision in Dried Fruits.[4] The judgment is vulnerable and I am going to occupy my time in Sydney dealing with it.' His notebooks were filled with detailed statements and analyses of the decisions on section 92 which had been decided since his retirement from the Bench.

In 1937, in addresses to the Australian Natives Association, a body which afforded him platforms on many occasions during his life, Isaacs put his arguments for constitutional reform. As he summed up these addresses:

> The central theme of my argument was that the changed and changing conditions of the world since the establishment of the Commonwealth in 1900 created a peremptory necessity for such amendments, so as to provide for a better organization, and for the simplification of our national defence, trade, industry and general well-being.[5]

In that year, two proposals to increase Commonwealth power by removing Commonwealth marketing laws from the restrictions of the guarantee of freedom of interstate trade imposed by section 92, and by giving the Commonwealth power to control air navigation and aircraft generally, had failed to command the required majorities when they were submitted to referenda as required by section 128 of the constitution. That section, which provides for the

[2] [1936] A.C. 578. See p. 187 above.

[3] Australian Democracy and Our Constitutional System (Melbourne 1939).

[4] Privy Council decision in *James v. Commonwealth*.

[5] Australian Democracy and Our Constitutional System, at p. 3.

amendment of the constitution, requires that a proposed amendment must be adopted at a referendum by a majority of the electors in the country as a whole, and by a majority of electors in a majority of the States.[6]

Isaacs set about the task of educating the electorate to a better sense of its responsibilities. In a lengthy pamphlet, *Australian Democracy and Our Constitutional System* (March 1939), he dealt with constitutional questions and also with various political matters. He expressed concern at the atrophy of parliament as an institution and drew attention to the constitutional doctrine which asserted the constitutional subordination of the cabinet to parliament.

> Why in a time of crisis *must* Parliament be silent? Why should it consent to be deaf, dumb, blind and impotent at the will of its own administrative officers and so reverse the relative positions the Constitution intends them to occupy? It is a breach of a fundamental right. How long will a sensible people tolerate it? How long will Australians stand by and see their National Parliament function like Trilby to sleep, wake, sing, or be silent at the dictation of whatever Svengali happens to be in control for the time being?[7]

Isaacs proposed procedures, by way of Standing Orders, to allow parliament, if need be without governmental authority and through the independent actions of its officers, to call itself into session. He also called for fuller and freer parliamentary debate, and in particular deplored the use of the guillotine by the government in cutting short discussion of important measures.

He also discussed two matters which had aroused considerable interest at the time. One was the public rebuke of the Prime Minister, J. A. Lyons, to the visiting British author H. G. Wells, for his public and, one may think, well justified criticisms of Hitler and Mussolini in December 1938 and January 1939. That the Prime Minister should have thought it appropriate officially to dissociate the government from the publicly expressed views of an individual celebrity is, to say the least, surprising, and Isaacs argued convincingly that it was quite out of line with long-established and cherished principles that government should interfere with freedom of speech by the pressure of public rebuke.

[6] These proposals had an over-all majority *against* of more than 250,000 and there were majorities *against* in New South Wales, South Australia, Western Australia and Tasmania. See Sawer: Australian Federal Politics and Law 1929-1949, at pp. 83-4.

[7] at pp. 7-8.

The other matter was the action taken by the Lyons government at the end of 1938 to compel waterside workers at Port Kembla to load pig iron for Japan. Earlier in 1938, the government had imposed an embargo on the export of iron ore, but it did not prohibit the export of pig and scrap iron, and the Broken Hill Company had contracted to supply 23,000 tons to Japan. The maritime unions opposed the loading on the ground that the material would be used by Japan in its war against China, and the waterside workers at Port Kembla refused to load a ship, the *Dalfram*, with 7000 tons of pig iron. Mr Menzies, who was then Attorney-General of the Commonwealth and Minister for Industry, met union representatives and made the points that it was not for Australia unilaterally to impose sanctions on Japan, and that it was not for a union, or for a particular section or group, in effect to dictate national and governmental policies. Later, on 8 December 1938, the government brought economic pressure to bear on the recalcitrant workers by specifying Port Kembla as a port to which the licensing provisions of the Transport Workers' Act applied. The use of this 'dog collar Act' which allowed the government to hold the threat of unemployment over recalcitrant waterside workers was much resented, though it achieved its aim in this case and the waterside workers loaded the *Dalfram*.

The issue aroused strong feelings, and there was a brief and sharp debate in the federal parliament on the adjournment on 8 December 1938. Isaacs, in a family letter in January 1939, had announced his intention to write publicly on the matter[8] and did so at length in this pamphlet. He treated the issue as a matter of individual conscience, and said that it had been grossly mishandled by the government whose action he characterized as 'one of the most regrettable episodes in the whole history of the Executive Government of the Commonwealth'.[9] His arguments were that the government had discriminated against Labour, since it would not have penalized a supplier of goods or services who might decline to supply them to Japan, and that the government, by using compulsion on the workers, was in breach of its obligation under international law to observe strict neutrality in the war between Japan and China. Neither argument was persuasive: there was simply no evidence on the first issue, and as to the second the government was rightly insistent that the union should not impose its judgment of national policy on the government; there was

[8] see p. 224 above.

[9] at p. 14.

no question of preferring one belligerent to another. For all the vigour and vehemence of his argument and his copious citations from international law authorities he failed to meet Menzies' points that the union could not be allowed to substitute its will for the policy of the government, and that if the union disapproved the government's policy in allowing the export of pig iron to Japan, the proper place to challenge it was not the wharf but the ballot box.

For the most part, the pamphlet was devoted to arguments in support of amendment of the Commonwealth constitution. On this occasion, he stressed the danger of constitutional weakness in face of the threat to Australian security from the aggressive dictators.

> Do not forget that Australia's raw materials, her possibilities of production, her markets and her strategic position are a great temptation . . . [Australia must prepare her defences and] this is only certainly possible by investing the National authority with every necessary means of preparation in peace to ensure efficiency should the hour of trial come.[10]

The specific amendments to the constitution which he proposed in this pamphlet appeared in part to be in aid of this object; in part they were Isaacs' responses to judicial interpretations of the constition with which he strongly disagreed.

Isaacs wrote on several occasions on constitutional matters. He wrote a series of articles in the *Age* newspaper in December 1939 in which he called for action to 'modernize the constitution'. By this time war had broken out, and in the face of the threat of Hitlerism he called for immediate constitutional reform to equip Australia with the necessary powers to discharge her national and international obligations effectively.[11] The outbreak of war, and Australia's involvement in it, expanded the national authority through extended wartime interpretations of the Commonwealth defence power, and it was not until the latter part of 1942 that the Commonwealth government took action to seek extension of Commonwealth authority in the post-war period. In October 1942 Evatt as Attorney-General introduced a bill to extend the constitutional powers of the Commonwealth for a period after the war to facilitate post-war reconstruction and the re-employment of ex-servicemen. This bill was ultimately referred to a special convention whose membership included the government and opposition leaders in the Commonwealth and the States, and it met in Canberra from 24 November

[10] at p. 32.

[11] Age, 2, 4, 5 December 1939.

to 2 December. Under Evatt's direction a book, *Post War Reconstruction: A Case for Greater Commonwealth Powers*, was prepared for the convention and this contained extracts from Isaacs' articles in the *Age* of December 1939 and the text of an address on *Australian Nationhood and the Constitutional Proposals* which Isaacs had delivered to the Australian Natives Association on 13 November 1942. In this speech, which specifically referred to the convention, Isaacs strongly supported the Commonwealth government's proposals. He welcomed the procedures which had been adopted in calling the convention, for although the State parliaments had no place as such in the constitutional processes for amending the constitution, it was desirable to have their representatives at the convention to assist in elucidating the meaning and effect of the Commonwealth's proposals. He discussed some of the proposals which were to be put to the convention and praised the government for:

> [its] courageous effort to entrust to the people of Australia, as one great family, the power now denied them of making their common concerns in their common inheritance a common enterprise . . . [He hoped for a] vastly improved governmental machine . . . one more worthy than we have at present of a people whose greater interests, internal as well as external, are now so intermingled that nothing but some artificial and increasingly burdensome provincial barriers of isolation that exist as survivals from a former condition of society, and of our constitutional status within the Empire, prevent them in many essential respects from pursuing, with combined intelligence and strength, the course of true Australian nationhood.[12]

He also broadcast at this time on the same theme and wrote detailed letters to his family on the preparations for and the reception of the broadcast. He was pleased with the favourable comment received, and dealt characteristically with those who were less sympathetic. 'From what I hear,' he wrote to Marjorie on 19 November,

> it has had some effect. All the papers—except one—that I have seen have been fair. That one is Sydney *Truth*—which calls me 'Glib'. Why that paper should be anti-Australian I cannot understand.

He looked forward to the Convention.

> As far as I can make out it is an antipathy to a Labour Govt. that is at the root of the opposition. They shut their eyes to the fact that

[12] at p. 136.

> a Constitution is for *all* Govts. and Parliaments (Commonwealth Parliaments) and they say 'Not for this Crowd'. If the U.A.P. were to bring forward the same proposals the opposition would be very much less. I really think it is desired to affect the next election in March—to bring the present Govt. into disfavour and get a majority. That is nothing to do with me—for I am not taking any 'political side'; but I want to see Australia more truly a nation than it is.

Certainly his great aim was the enhancement of national power, but there can be no doubt of Isaacs' sympathy for the Curtin government.

He was very pleased when Curtin and Evatt made approving references to his views at the convention, and Evatt spoke of him as 'an almost legendary authority'.[13] The convention agreed to avoid the difficulties of a constitutional referendum by proposing a reference of powers by the States to the Commonwealth as authorized by section 51 (xxxvii) of the constitution.[14] A model bill was agreed to, and it referred to the Commonwealth, for a limited period after the war, power to legislate with respect to fourteen broad matters which included reinstatement of returned servicemen, employment and unemployment, organized marketing of commodities, companies, combines and monopolies, profiteering and prices, production and distribution of goods (in the case of primary production only with the consent of a State), control of overseas exchange and investment, the raising of money under Loan Council decisions, air transport, uniformity of railway gauges, national works, with the consent of a State in respect of works in that State, national health 'in co-operation with the States', family allowances, and the Aboriginal race. A number of these matters had been proposed by Isaacs as appropriate Commonwealth powers in his March 1939 pamphlet, though he made other recommendations at that time which were not included in this bill.

In the event, the proposals came to nothing; only New South Wales and Queensland passed the bill as drafted, while South and Western Australia made amendments to it. Victoria passed it conditionally on all other States adopting it, and the Tasmanian

[13] Argus, 25 November 1942.

[14] This provides that the Commonwealth parliament has power, subject to the constitution, to legislate with respect to matters referred to the parliament or parliaments of any State or States, but so that the law shall extend only to States by whose parliaments the matter is referred, or which afterwards adopt the law.

Upper House refused to pass it. Isaacs then wrote a lengthy pamphlet, *An Appeal for a Greater Australia*, which appeared under the auspices of the Australian Natives Association at the end of July 1943. This time Isaacs argued forcefully for constitutional reform by what he declared to be the only appropriate means, actual amendment of the Commonwealth constitution. He reviewed the history of the convention procedures of 1942 and the aftermath which showed the 'futility of looking to State parliaments for a democratic Australia',[15] and he pointed out that in any event there was a fatal constitutional flaw in the procedure, since the constitution did not permit reference of matters by the States to the Commonwealth for a limited time, as the model bill contemplated. Notwithstanding the expression of views by constitutional authorities which supported the validity of such a limited reference, he concluded that they were vitiated by 'basic error',[16] a not unfamiliar piece of Isaacs phraseology. Since that time, however, the High Court has ruled to the contrary in holding that a reference may be made for a limited time,[17] not that that would necessarily have led Isaacs to change his mind.

Isaacs repeated his earlier arguments in support of constitutional reform by way of submission of proposals to the electorate under section 128 of the constitution. He pointed to the post-war needs of Australia and to profound changes in the character and structure of the Australian nation.

> The facts of life move on. Such a Constitution as ours, unless, as intended, it keeps pace with the needs of our national growth, cripples it, like the Chinese shoe of old. Our national development has long made many of the water-tight compartments, denied to the Commonwealth forty odd years ago, not only insufficient but obstructive to Australian progress, whether that be regarded from the standpoint of the Nation, the States or Individuals.[18]

The old radical sympathies came out.

> The paradoxes of mass production and unemployment; of the right to gather unrestricted profits with the spectre of reduced consumption; of monopolies, and the struggle for existence of the individual trader; of palatial mansions and crowded and insanitary

[15] at p. 16.

[16] at p. 28.

[17] *Queen v. Public Licensing Appeal Tribunal (Tas.), ex parte Australian National Airways Pty Ltd* (1964) 113 C.L.R. 207.

[18] at p. 18.

slums; of a land of teeming sustenance and malnutrition; these are some of the problems that defy the older idea, that looked upon the corporate organism called a 'State' as not in any way a social adjuster, but as a policeman only, an idea still far from extinct.[19]

In a word, the existing federal structure aided the survival of social and economic injustice.

In his family letters, Isaacs expressed his gratification at the reception of this formidable and difficult pamphlet. The Federal government in February 1944 resolved to take action, and Evatt in that month introduced a bill to submit the fourteen proposals which had been in the model bill to a constitutional referendum. Evatt now added three constitutional guarantees: a guarantee of freedom of speech and expression binding Commonwealth and States alike, a clause extending to the States the guarantee of religious freedom, which, in the constitution as it stood, bound the Commonwealth only, and a clause providing for more stringent parliamentary control and surveillance of government regulations. The proposed powers were to be conferred on the Commonwealth for a limited time. In the parliamentary debate and in the subsequent referendum campaign there were sharp clashes and differences, and the referendum was made a party issue.[20] Isaacs, of course, had no doubts and strongly supported the proposals. He wrote a foreword to Mr John Barry's pamphlet *Wider Powers for Greater Freedom*.[21] In terms familiar, he supported the case for the grant of the powers; he explained and supported the incorporation of the constitutional guarantees. How deeply he believed in these is questionable; in *Australian Democracy and Our Constitutional System* in March 1939 he had written:

I do not favour any attempts to insert what are called guarantees of personal freedom of speech, thought, or action in a Constitution. . . . In a democratic Community, the only true guarantee is the sense of the people itself. Freedom is sometimes invaded; it was in some instances to which I have already referred. But the corrective is in the hands of the People's representatives either by law or political action to prevent any invasion. As an instance of the inadvisability of leaving a bare declaration of freedom to Judges to measure out what

[19] ibid.

[20] For a concise summary see Sawer: Australian Federal Politics and Law 1929-1949, at pp. 172-3.

[21] (Rawson's Book Shop; Melbourne 1944). This was the text of a lecture given at Melbourne University in March 1944. The author is now Sir John Barry, a Justice of the Supreme Court of Victoria.

they believe to be right in the circumstances, we need go no further than the recent Privy Council decision on Section 92.[22]

Isaacs was not much given to changing his mind on matters on which he had expressed himself so dogmatically, and we may guess that in 1944 he was prepared to put aside his objections in the interests of the major referendum proposals.

At the referendum which was held on 19 August 1944 the electorate voted against the proposals. The government tried again in 1946. This time there were three proposals: one would have given the Commonwealth power to legislate with respect to organized marketing free from the restrictions of section 92; the second would have greatly enlarged the Commonwealth industrial power by authorizing the making of laws with respect to the terms and conditions of industrial employment; and the third, and, in the event, the only one which was adopted, empowered the Commonwealth to make laws with respect to various social services and benefits. Isaacs entered the lists once again with *Referendum Powers: A Stepping-Stone to Greater Freedom* published first in the *Age* and then as a pamphlet. He dealt with each of the proposals in detail: his references to decisions of the American Supreme Courts showed that he was well up to date in his reading, and he dealt convincingly with opposition arguments that a representative convention should consider the case for constitutional reform before proposals were put to the people. That device he scornfully rejected; the old style came out in his description of it as an 'excrescence'.[23] It was for the people to consider directly what the parliament put forward as a proposed constitutional amendment; it was incomprehensible that the people should not give to the national parliament powers which were entrusted to many other legislatures within the British Commonwealth. But two of the three proposals were not accepted, though the margin was narrow. Isaacs' verdict on this act of folly was set out quite clearly in a letter to Marjorie in April 1947. 'It is the Opposition that squelched the Referendum and the responsibility will be theirs.' They shouldered it quite cheerfully. In the last months of Isaacs' life, the government tried again. By the Constitution Alteration (Rents and Prices) Bill in 1947 it submitted to the people proposals to amend the constitution by conferring power to control rents and prices on the Commonwealth.

[22] at pp. 35-6.

[23] at p. 30.

In May 1948, this referendum proposal was decisively rejected, but by that time Isaacs was dead.

His battle for constitutional reform proved, with one exception, to be a losing one. But so long as he had strength, and this he possessed almost to the end, he carried on the battle. He repeated the arguments again and again, and to my mind they were and remain convincing. As late as the end of the fifties, a Joint Parliamentary Committee on Constitutional Review, composed of members of the federal parliament drawn from both Houses and all parties, recommended many constitutional changes which would have substantially increased Commonwealth powers. Little has since been done to submit those proposals to the electorate, and the cause of constitutional reform languishes.

In his letters, Isaacs wrote with concern of the industrial and political problems with which the federal government was confronted in the turbulent and difficult post-war years. He maintained his interest in a wide range of more general matters; in August 1945 he gave Marjorie an account which he had read in a Sydney Italian newspaper of the work and career of Enrico Fermi who had played a prominent part in work on the atom in the United States during the war years. The new and terrible weapon gave added urgency to his views on the need for improved international organization. In the latter thirties, in speech and writing, he had lamented the inadequacies of the League of Nations; at the age of ninety-one, at the request of Mr Dal Stivens, he wrote a statement on World Peace in which he argued the necessity for a waiver of national sovereignty and for the establishment of an international force which would police and preserve the peace. He regarded the veto given by the United Nations Charter to the permanent members of the Security Council as fatal to the cause of international order and security.[24]

Zionism, constitutional reform, international disorder, Commonwealth and State politics, religious matters and articles, family matters; all of these occupied the attention of this extraordinary old man. They all found their way into his letters, together with the jokes and puzzles, the family news and the accounts, sometimes quite detailed, of his acquisition of 'Tatt's tickets'[25] which,

[24] The text of this document is reprinted by Max Gordon: Sir Isaac Isaacs, at pp. 189-91.

[25] A well known Australian lottery.

it appears, he bought quite regularly. In these latter years, he husbanded his strength. He made occasional appearances at ceremonial functions: in February 1946 he wrote to Marjorie that he had attended the reception given by the judges of the Supreme Court of Victoria to mark the opening of the legal year, and that he was pleased with his reception. 'I met many old friends. Starke was there, and said to me "Why you're looking younger than ever."' Later in the same year he attended the King's Birthday levée in the dress of a Privy Councillor.

He became frailer, and in the winter of 1947 he suffered from respiratory infections. This kept him at home for some time, though it did not keep him from his reading and his writing. On 6 August of that year he celebrated his ninety-second birthday. There were many messages of congratulations and goodwill, and the newspapers reported interviews with him in which he disclosed the secret of vigorous old age. 'The way to keep going,' he was reported as saying, 'is simply to keep going. The more interests you have, the longer you are likely to be able to enjoy them.' Cuttings of these interviews were enclosed in a letter to Marjorie in which Isaacs told with obvious pleasure of the events of his birthday:

> I have had wires, phones and letters pouring in on me. I am giving you an idea of a fearfully busy two days (5th and 6th). Last evening I was very tired and so was Mother. So we determined to go to bed at 8.30. Then came a phone from a pressman (Stephens) representing the *Daily Telegraph* whose Editor *insisted* on his coming although he said it was very late. I was nearly undressed, but as I didn't want to let a pressman down I dressed and told him the reason I consented to see him, tired out as I was.

A few days later he had a visiting English minister of the Crown to lunch, and he wrote to Marjorie that his visitor 'told me that he had heard of me all over where he had been in Australia, and everybody said that I am the most respected man in Australia'. It was all very satisfactory, and the recognition gave him great pleasure.

The last letter available to me was dated 12 October 1947. It was to Marjorie, and the handwriting remained strong and the letter was a long one. It dealt with State and federal politics, with Zionism, the unstable international situation; there was a reference to Bernard Shaw and a collection of rhymes. There was not the slightest evidence of any weakening of that strong, determined

mind, and he was at that very time writing at length to the press on the current Victorian political crisis. The body, however, was failing, and he was becoming frailer and deafer. At the end, he was ill for some weeks, and he died in his sleep at his home in Marne Street, South Yarra, in the early hours of the morning of 11 February 1948. Tributes came from many quarters, from the Governor-General, Mr McKell, who spoke of the 'indelible imprint' of his service to the Commonwealth; from the government; from Mr Menzies, then leader of the Opposition, who spoke of him as 'one of the most remarkable men in the history of Australia'. The High Court, speaking through the Chief Justice, Sir John Latham, paid appropriate tribute. The newspapers wrote more fully; the *Age* spoke of his life as the Australian version of from Log Cabin to White House. Its judgment was that 'he was perhaps the greatest Australian of our time, or any previous time'. And there were many more fine tributes.

The Commonwealth government accorded him a State funeral and he was buried in the Melbourne General Cemetery after a synagogue service at which the eulogy was delivered by his old friend, Rabbi Jacob Danglow. The rabbi had had a long and close association with Isaacs, and they were men whose views on many Jewish matters had closely coincided. He spoke of Isaacs with deep feeling and sincerity: 'This wonderful man amongst men: this true Australian.' In the presence of death it is not asked that there should be a precise and measured judgment, for it is a time to speak of the best in the man who is gone. Looking back over this marvellous career, it was surely right then to speak these words of Isaacs.

In the larger perspective there is much more to be said. Almost twenty years after his death, there are few tangible memorials to Isaacs: a name of a metropolitan federal electorate in Victoria, a place name in Canberra, and a title to a Chair of Law in a university which was named for his contemporary, Monash. The comparison in this respect with Monash is striking. To commemorate the centenary of his birth in 1865, a special Australian stamp was issued, while Isaacs' hundredth anniversary, ten years earlier, passed unnoticed. Monash's name was given to a Victorian university and to other places and institutions, and each year ceremonies honour his memory. Of course he is known principally as a soldier and as a man of action; the life of a lawyer, politician and judge does not attract the popular imagination or interest in the same

way. But it is surprising nonetheless that Isaacs, whose extraordinary achievements bear such striking testimony to the career open to talent, is almost forgotten.

There are still many people who remember him well. Some of the recollections, which go back to his years on the Bench, and are the memories of lawyers and judges, are unfriendly. Some of the stories they tell have been noted in these pages: his references to cases and legal authorities as if drawn from memory, when in fact he had the books in his chambers; the embroidering in his judgments of a point which he had told counsel not to pursue in argument. They are not very important in themselves, for Isaacs had a marvellous memory and his judgments were often elaborate and detailed. What is significant is the fact that the stories and recollections are so often unfavourable, and that in some cases the comments are extremely harsh. This unfriendly opinion is by no means universal among lawyers: men who attained great eminence in the law have spoken of him in terms of high regard, though their praise is generally expressed in terms of an acknowledgment of high ability rather than of warmth and personal friendship. He does not emerge in the tradition of the profession as one who is remembered with affection.

It was so, too, in his lifetime. It emerges very clearly in Deakin's picture of him at the time of the convention. Deakin strove to be fair: he spoke of great abilities, energy, determination and courage; but it comes through clearly that Isaacs was not a popular or a likeable man. Garran, who worked closely with him when Isaacs was Attorney-General of the Commonwealth, praised his talents, energy and industry, but there is no suggestion of any personal warmth of feeling for his chief. Rather there are suggestions of over-subtlety and contrivance which Garran found uncongenial. Between Isaacs and the cold Chief Justice Griffith there was no liking, and the letters written by the warmer, kindlier Barton in 1913 are quite startling in their expression of hatred for him. From them, there emerges a picture of Isaacs as a thrusting man, caballing against his older colleagues in his determination to make his points and to advance his own interests and position. When the controversy over the Governor-Generalship developed in 1930, it was conducted on the surface as a matter of principle rather than of personality, but there can be no doubt that in the minds of some of the leading Australian opponents of the appointment it was affected by personal

animus. Between Isaacs and his lawyer brother-in-law, P. A. Jacobs, there was no warmth and, on the part of Jacobs, a dislike which survived long beyond Isaacs' death. What produced this I do not certainly know; Jacobs spoke to me when a very old man of his brother-in-law's unkindness and overbearing qualities.

It was said by Barton and by other unfriendly critics that Isaacs was not to be trusted. From the days of the *Mercantile Bank Case*, it appeared to some contemporaries that he was motivated by personal interest. The folly of O'Loghlen's action in withdrawing the prosecution is undoubted, but I have suggested that the course which Isaacs took from *inside* the ministry was quite wrong. It won him popular applause, but it not surprisingly earned him deep distrust in influential quarters. Isaacs saw his goals very clearly: at times, one might think, too clearly. The desired ends were to be pursued relentlessly. This is a great flaw in a man: the means by which he seeks to achieve his ends may be corrupting, and in my view, Isaacs never understood this.

His dogmatism, his appalling conviction of rightness as I have earlier called it, which was supported by massive rhetoric, copious citation of authorities and interminable statement, did not commend him to those who had to endure it. His intense dogmatism is revealed in many utterances and actions, and it emerged at its very worst in the Zionist controversy of the early 1940s. He was then a very old man, but still very vigorous and in full possession of his faculties. At a time when Australian Jewry was shattered by the hideous events which were taking place in Europe, and clamoured for a refuge in Palestine for the remnant of European Jewry, Isaacs used and deliberately used his position as the most distinguished Jew in Australia to smash and humiliate those who opposed his views. He embarrassed them greatly; he called them no less than traitors, and certain sections of the press took up his charges with glee, as he well knew. His arguments were dealt with ably by Julius Stone, and Isaacs turned on Stone with great anger. He was outraged by the opposition, which met him, squarely, on his own ground. Then, as so often before, it was inconceivable to him that he could be wrong, and those who took the contrary view were at best fools and more likely knaves. His part in this controversy left a blemish on his reputation in the Australian Jewish community, which had taken pride in the splendour of his career, even while it had regretted his remoteness from its life and activities.

In his *Anecdotes of Painting*, Walpole records Oliver Cromwell's admonition to the painter:

> Mr Lely, I desire you would use all your skill to paint my picture truly like me, and not flatter me at all; but remark all these roughnesses, pimples, warts and everything as you see me, otherwise I will never pay a farthing for it.

With or without the admonition of his subject, the biographer must follow a like course, and what has been written is intended to explain why Isaacs was disliked by some, and often so strongly. His defects have so strongly influenced some men that they will see nothing good. But there are many others who remember Isaacs with great warmth, affection and devotion. They include people who served him, like John Keating, his last associate, his doctors, clergymen with whom he pursued long religious and philosophical discussions, and friends and acquaintances drawn from diverse walks of life. He is remembered by them as warm and friendly, courteous and considerate, as a kindly man. There are happy recollections of his pleasure in the company of children, his kindness and thoughtfulness as a host, particularly at Marnanie. There are many stories of his remembrance of the birthdays, anniversaries and tribulations of humble and simple people. To these people, with many of whom I have talked, it is shocking and distressing that other men should have spoken so harshly of Isaacs. They attribute it to unworthy motives and particularly to anti-Semitism. In some cases and in part they may be right, but it is not the whole of the story.

There can be no doubt that Isaacs was profoundly affected by his powerful mother, and it is really not surprising that in his middle fifties he should have written such extraordinary letters to her. Her dominant personality and her driving ambitions were brought out in him and became part of him.

The letters of a later time to his family tell us a good deal more about Isaacs. They are curious in their regular budget of puzzles and rather trivial jokes, which he also liked to tell to those about him. For all the jokes and puns and tricks, he really lacked a sense of humour, for he was wanting in insights into himself and above all in self-deprecation. The letters reveal, as do other aspects of his life, the enormous range of his interests and reading. It was more common in Isaacs' generation that a man should have continuing and wide-ranging interests in the humanities and the

natural sciences, and that he should feel himself in touch with the greater part of human knowledge. He had a lively interest in so many things: students of my generation remember his detailed questions in the Melbourne Public Library about their work and their courses. Reading the letters, it is very hard not to feel affection and a great admiration for this extraordinary old man, though it is often qualified by irritation and sometimes by anger at his insensitivity and his dogmatic and relentless judgments on persons and issues.

He took great pride, sometimes a pleasing and almost childish pride, in the achievements of a brilliant career. He was a master lawyer, and one of the greatest judges in our federal history, and he brought to his work and to the whole of his public life an unflagging and almost inexhaustible energy and a mind of great strength, power and range. He was big in his qualities, and it is unfortunate that some have dwelt so strongly on the defects. For it is certain that he ranks as a major figure in the history of the Australian nation.

INDEX

UQP BIOGRAPHY

This new edition sets the remarkable career of the first native born Governor-General of Australia against the unfolding political and legal backdrop of his day. Isaac Isaacs entered politics in 1892. He became a distinguished lawyer, Victorian and Australian parliamentarian, founding father of the Commonwealth Constitution, Justice and Chief Justice of the High Court and in 1931 Governor-General. His long life extended over the second half of the nineteenth and the first half of the twentieth centuries. His approach to legislative policies and to the law was progressive; in his judicial interpretations of the Constitution he was a consistent supporter of an expanding national power.

Generous in scope, this biography depicts Isaacs as a respected liberal, and as an ardent nationalist and imperialist. He was also a complex and enigmatic figure whose career was dogged with controversy. His appointment as Governor-General and the opposition to a "local" man in Vice Regal office is fully explored. So too is his later angry clash with fellow Jews over "political Zionism" and British policy in Palestine.

Ten years after the first publication of this biography, Sir Zelman Cowen was himself appointed as Governor-General. In his Introduction, which includes new material, he reflects upon the special link between subject and biographer.

"A masterly and fascinating book ... a candid portrait of this outstanding Australian, warts and all."

Alan Trengove

"Comprehensive and fascinating ... a significant achievement. ... not only a work of deep scholarship, urbanely written and lucidly presented; it is also the product of an intellectual integrity that is enlivened by warm human sympathy ..."

Sir John Barry, *Meanjin*

ISBN 0-7022-2453-7

9 780702 224539

Cover design by Craig Glasson using Sir John Longstaff's portrait (1934) of Governor-General, Sir Isaac Isaacs. (Courtesy Historic Memorials Committee, Parliament House, Canberra)